TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1951

No. 120

GENE MITCHELL GRAY, LINCOLN ANDERSON BLAKENEY, JOSEPH HUTCH PATTERSON AND JACK ALEXANDER, APPELLANTS,

vs.

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF TENNESSEE, ETC., ET AL.

APPEAL FROM UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

FILED JUNE 15, 1951.

Jurisdiction Postponed October 15, 1951.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., Nov. 5, 1951.

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION

Civil Action No. 1567

GENE MITCHELL GRAY, LINCOLN ANDERSON BLAKENEY, JOSEPH HUTCH PATTERSON, JACK ALEXANDER, *Plaintiffs*,

v.

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF TENNESSEE, consisting of GORDON BROWNING, Governor of the State of Tennessee, JAMES A. BARKSDALE, Commissioner of Education of the State of Tennessee, EDWARD JONES, Commissioner of Agriculture of the State of Tennessee, CLOIDE EVERETT BREHM, President of The University of Tennessee, FRANK R. AHLGREN, THOMAS H. ALLEN, CLYDE B. AUSTIN, HARRY S. BERRY, W. P. COOPER, WILLISTON M. COX, E. W. EGGLESTON, JAMES A. FOWLER, JAMES T. GRANBERY, SAM J. MCALLESTER, WASSELL RANDOLPH, GEORGE C. TAYLOR, I. B. TIGRETT, CHARLES R. VOLZ, as member trustees, who together, as such, constitute The Board of Trustees of The University of Tennessee, THE UNIVERSITY OF TENNESSEE, a corporation with its chief office in Knox County, Tennessee, at Knoxville c/o CLOIDE EVERETT BREHM, President; CLOIDE EVERETT BREHM, EUGENE A. WATERS, WILLIAM HENRY WICKER, RICHMOND FREDERICK THOMASON, *Defendants*

[File endorsement omitted.]

COMPLAINT—Filed January 12, 1951

1. (a) The jurisdiction of this Court is invoked under Title 28, United States Code, section 1331. This action arises under the Fourteenth Amendment of the Constitution of the United States, section 1, and the Act of May 31, 1870, Chapter 114, section 16, 16 Stat. 144 (Title 8, United States Code, section 41), as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand ($3,000.00) Dollars.

[fol. 2] (b) The jurisdiction of the Court is also invoked under Title 28, United States Code, section 1343. This action is authorized by the Act of April 20, 1871, Chapter 22, section 1, 17 Stat. 13 (Title 8, United States Code, section 43), to be commenced by any citizen of the United States or other person within the jurisdiction thereof to redress the deprivation, under color of a state law, statute, ordinance, regulation, custom or usage, of rights, privileges and immunities secured by the Fourteenth Amendment of the Constitution of the United States, section 1, and by the Act of May 31, 1870, Chapter 114, section 16, 16 Stat. 144 (Title 8, United States Code, section 41), providing for the equal rights of citizens and of all other persons within the jurisdiction of the United States, as hereinafter more fully appears.

(c) The jurisdiction of this Court is also invoked under Title 28, United States Code, section 2281. This is an action for an interlocutory injunction and a permanent injunction restraining the enforcement, operation and execution of statutes of the State of Tennessee by restraining the action of defendants, officers of such State, in the enforcement and execution of such statutes and of an order made by The Board of Trustees of The University of Tennessee, being composed of the following member trustees, the defendants, Gordon Browning, Governor of the State of Tennessee, James A. Barksdale, Commissioner of Education of the State of Tennessee, Edward Jones, Commissioner of Agriculture of the State of Tennessee, Cloide Everett Brehm, President of The University of Tennessee, Frank R. Ahlgren, Thomas H. Allen, Clyde B. Austin, Harry S. Berry, W. P. Cooper, Williston M. Cox, E. W. Eggleston, James A. Fowler, James T. Granbery, Sam J. McAllester, Wassell Randolph, George C. Taylor, I. B. Tigrett, and Charles R. Volz, who together as such trustees constitute The Board of Trustees of The University of Tennessee, and who are hereinafter referred to as defendant The Board of Trustees of The University of Tennessee, acting as an administrative board or commission under statutes of such state, as hereinafter more fully appears.

2. Plaintiffs Gene Mitchell Gray, Lincoln Anderson Blakeney, Joseph Hutch Patterson, and Jack Alexander

are citizens of the United States and of the State of Tennessee, are residents of and domiciled in the city of Knoxville of Knox County in the State of Tennessee, and are members of the Negro race.

[fol. 3] 3. (a) Plaintiff Gene Mitchell Gray is a citizen and resident of the State of Tennessee, is twenty-two years of age, is of good health and moral character, and is fully qualified in all lawful and proper respects for admission to the Graduate School of The University of Tennessee. He has completed an approved high school course of four years at Swift Memorial High School in the City of Rogersville, Tennessee, a duly accredited high school. He is a graduate of, and has received the degree of Bachelor of Science in 1950 from Knoxville College in the City of Knoxville, Tennessee, a duly accredited College having a program similar to that of the College of Liberal Arts of The University of Tennessee. He has at all times material herein and in all particulars met all of the qualifications necessary for admission as a graduate student to the Graduate School of The University of Tennessee, which facts defendants do not deny. He is now, and at all times material herein was and has been, ready, willing and able to pay all lawful charges and fees requisite to his admission, and is now, and at all times material herein was and has been, ready, willing and able to comply with all lawful rules and regulations requisite to his admission therein.

(b) Plaintiff Lincoln Anderson Blakeney is a citizen and resident of the State of Tennessee, is twenty-nine years of age, is of good health and moral character, and is fully qualified in all lawful and proper respects for admission as an undergraduate student in law to the College of Law of The University of Tennessee. He has completed an approved high school course of four years at Austin High School in the City of Knoxville, Tennessee, a duly accredited high school. He is a graduate of, and has received the degree of Bachelor of Arts in 1947 from Knoxville College in the City of Knoxville, Tennessee, a duly accredited College having a program similar to that of the College of Liberal Arts of The University of Tennessee. He is also a graduate of, and has received the degree of Master of Arts in the field of Sociology from Atlanta University in the City of Atlanta, Georgia, a duly accredited University.

He has at all times material herein, and in all particulars met all the qualifications necessary for admission as an undergraduate student in law to the College of Law of The University of Tennessee, which facts defendants do not deny. He is now, and at all times material herein was and has been, ready, willing and able to pay all lawful charges and tuition requisite to his admission, and is now, [fol. 4] and at all times material herein was and has been, ready, willing and able to comply with all lawful rules and regulations requisite to his admission therein. He is also a veteran of World War II, and was honorably discharged from the United States Army with the rank of First Sergeant.

(c) Plaintiff Joseph Hutch Patterson is a citizen and resident of the State of Tennessee, is twenty-eight years of age, is of good health and moral character, and is fully qualified in all lawful and proper respects for admission as an undergraduate student in law to the College of Law of The University of Tennessee. He has completed an approved high school course of four years at Douglas High School in the City of Kingsport, Tennessee, a duly accredited high school. He is a graduate of, and has received the degree of Bachelor of Science in 1950 from West Virginia State College in the City of Institute, West Virginia, a duly accredited College having a program similar to that of the College of Liberal Arts of The University of Tennessee. He has at all times material herein and in all particulars met all the qualifications necessary for admission as an undergraduate student in law to the College of Law of The University of Tennessee, which facts defendants do not deny. He is now, and at all times material herein was and has been ready, willing and able to pay all lawful charges and tuition requisite to his admission, and is now, and at all times material herein was and has been, ready, willing and able to comply with all lawful rules and regulations requisite to his admission therein. He is also a veteran of World War II, and was honorably discharged from the United States Navy with the rank of Petty Officer, 2nd Class.

(d) Plaintiff Jack Alexander is a citizen and resident of the State of Tennessee, is twenty-eight years of age, is of good health and moral character, and is fully quali-

fied in all lawful and proper respects for admission as a graduate student to the Graduate School of The University of Tennessee. He has completed an approved high school course of four years at Austin High School in the City of Knoxville, Tennessee, a duly accredited high school. He is a graduate of, and has received the degree of Bachelor of Arts in 1950 from Knoxville College in the City of Knoxville, Tennessee, a duly accredited College having a pro-
[fol. 5] gram similar to that of the College of Liberal Arts of The University of Tennessee. He has at all times material herein and in all particulars met all of the qualifications necessary for admission as a graduate student to the Graduate School of The University of Tennessee, which facts defendants do not deny. He is now, and at all times material herein was and has been, ready, willing and able to pay all lawful charges and fees requisite to his admission, and is now, and at all times material herein was and has been, ready, willing and able to comply with all lawful rules and regulations requisite to his admission therein. He is also a veteran of World War II, and was honorably discharged from the United States Army with the rank of First Sergeant.

4. Plaintiffs Gene Mitchell Gray, Lincoln Anderson Blakeney, Joseph Hutch Patterson, Jack Alexander, and each of them, being citizens of the United States and of the State of Tennessee who have applied and are duly qualified for admission to The University of Tennessee, as will hereinafter more fully appear, but who have been denied admission thereto solely on the ground of race or color by the aforesaid defendants under color of the Constitution and Statutes of the State of Tennessee, and being persons having a joint interest in securing relief from the injuries sustained as a result of being deprived of their rights and privileges secured by the Constitution and laws of the United States, join on the same side as plaintiffs in bringing this action pursuant to Rule 19 and/or Rule 20 of the Federal Rules of Civil Procedure.

5. Plaintiffs bring this action in their own behalf as above set forth, and, there being a common question of law and fact affecting the rights of all Negro citizens of the United States residing in the State of Tennessee simi-

larly situated, who are duly qualified for admission to The University of Tennessee and who are prevented from attending said institution because of their race or color, and who are so numerous as to make it impracticable to bring all before the Court, and a common relief being sought, as will hereinafter more fully appear, bring this action, pursuant to Rule 23 of the Federal Rules of Civil Procedure, also on behalf of all Negro citizens of the United States residing in the State of Tennessee, similarly situated and affected, as will hereinafter more fully [fol. 6] appear.

6. The State of Tennessee has established, and as a state function maintains and operates an institution known as The University of Tennessee (*Acts of Tennessee, 1807, ch. 64 & ch. 78, as amended by Pub. Acts of 1840, ch. 98, secs. 4, 5; Pub. Acts of 1868-69, ch. 12; Pub. Acts of 1879, ch. 75; Pub. Acts of 1909, ch. 48 & ch. 264; Pub. Acts of 1915, ch. 26; and Code of Tennessee, Vol. 1, Title 111, Chapter 3, Article 10*); two of the integral parts or departments whereof are the Graduate School and the College of Law. The Graduate School is maintained and operated to afford graduate study in diverse fields—including programs of study leading to the degree of Master of Science in Chemistry with major in Bio-Chemistry, and leading to the degree of Master of Arts in French—to graduate students. The College of Law is maintained and operated to afford a program of study and courses leading to the degree of Bachelor of Laws to undergraduate students in law. There is no other institution maintained or operated by the State of Tennessee at which plaintiffs might obtain the graduate and/or legal education for which they respectively have applied to The University of Tennessee.

7. (a) Defendant The Board of Trustees of The University of Tennessee exists pursuant to the Constitution and laws of the State of Tennessee as an administrative board or agency thereof discharging essential governmental functions (*Constitution of Tennessee, Art. 11, sec. 12; Acts of Tennessee, 1807, ch. 64 & ch. 78, as amended by Pub. Acts of 1840, ch. 98, secs. 4, 5; Pub. Acts of 1879, ch. 75; see also Pub. Acts of 1909, ch. 48, Pub. Acts of 1939, ch. 30, sec. 1, and Code of Tennessee, Vol. 1, Title 111, Chapter 3, Art. 10*); it exercises over-all authority with reference

to the regulation of instruction and admission of students to The University of Tennessee, including the Graduate School and the College of Law thereof (*Acts of Tennessee, 1807, ch. 64, sec. 3; Pub. Acts of 1840, ch. 186, sec. 5, and Code of Tennessee, secs. 563, 566, 577, 584.8a*); and is the governing body of The University of Tennessee (*Pub. Acts of 1909, ch. 48, sec. 1*).

(b) Defendant, The University of Tennessee is a corporation duly chartered, organized and existing under the Laws of Tennessee and is declared by law to be a body politic and corporate (*Acts of Tennessee, 1807, ch. 64, sec. 1,* [fol. 7] *as amended by Pub. Acts of 1840, ch. 98, secs. 4, 5; Pub. Acts of 1879, ch. 75; Pub. Acts of 1909, ch. 48, and Pub. Acts of 1915, ch. 26*); and it operates as an essential part, and as head, of the public school system of the State of Tennessee maintained by appropriations from the public funds of said State raised by taxation upon the citizens and taxpayers of said State, including plaintiffs (*Pub. Acts of Tennessee, 1909, ch. 264, secs. 8, 9; Pub. Acts of 1917, ch. 35; Pub. Acts of 1927, ch. 2, sec. 7; Pub. Acts of 1939, ch. 16, sec. 9; Pub. Acts of 1941, ch. 8, sec. 9; Pub. Acts of 1943, ch. 135; Pub. Acts of 1945, ch. 180, secs. 1, 11; Pub. Acts of 1947, ch. 8 & ch. 161, and Pub. Acts of 1949, ch. 9, secs. 1, 28*).

(c) All of said defendants, above named as member trustees of The Board of Trustees of The University of Tennessee, are citizens and residents of the State of Tennessee, and are being sued herein in their official capacities as such trustees.

(d) Defendant Cloide Everett Brehm is the duly appointed, qualified and acting President of The University of Tennessee, and as such is subject to the authority, rules and regulations of the defendant The Board of Trustees of The University of Tennessee as an immediate agent governing and controlling the several colleges, schools, and departments of The University of Tennessee.

(e) Defendant Eugene A. Waters is the duly appointed, qualified and acting Dean of the Graduate School of The University of Tennessee, and as such is subject to the authority, rules and regulations of the defendant The Board of Trustees of The University of Tennessee and of

defendant Cloide Everett Brehm, as an agent governing and controlling the Graduate School of The University of Tennessee, whose duties include being in charge of matters pertaining to the admission and acceptance of applicants eligible to enroll as students therein, including the plaintiff Gene Mitchell Gray and the plaintiff Jack Alexander.

(f) Defendant William Henry Wicker is the duly appointed, qualified and acting Dean of the College of Law of The University of Tennessee, and as such is subject to the authority, rules and regulations of defendant The Board of Trustees of The University of Tennessee, and of defendant Cloide Everett Brehm, as an agent governing and controlling the College of Law of The University of Tennessee, whose duties include being in charge of matters pertaining to the admission and acceptance of applicants eligible to enroll as students therein, including plaintiff Lincoln Anderson Blakeney and plaintiff Joseph Hutch Patterson.

[fol. 8] (g) Defendant Richmond Frederick Thomason is the duly appointed, qualified and acting Dean of Admissions and Records of The University of Tennessee, and as such is subject to the authority, rules and regulations of defendant The Board of Trustees of The University of Tennessee and of defendant Cloide Everett Brehm, as an agent governing and controlling or administering the admission and acceptance of applicants eligible to enroll in The University of Tennessee, including plaintiffs and each of them, whose duties include the passing upon the eligibility of applicants who seek to enroll as students in The University of Tennessee, including plaintiffs and each of them.

(h) All of the individual defendants are under the authority, rules and regulations, supervision and control of, and act pursuant to the orders, policies, practices, customs and usages of, and established by, defendant The Board of Trustees of The University of Tennessee.

(i) All of said individual defendants are citizens and residents of the State of Tennessee, and are being sued herein in their respective official capacities.

8. (a) During the period when defendants were receiving applications from white persons for admission as gradu-

ate students to the Graduate School, and as undergraduate students in law to the College of Law of The University of Tennessee, plaintiff Gene Mitchell Gray duly applied for admission as a graduate student to the Graduate School of The University of Tennessee, for study leading to the degree of Master of Science in the field of Chemistry with major in Bio-Chemistry, said application being for registration on the first day of the Fall Quarter, 1950.

(b) During the same period mentioned above, plaintiffs Lincoln Anderson Blakeney and Joseph Hutch Patterson, and each of them, duly applied for admission as undergraduate students in law to the College of Law of The University of Tennessee, for study leading to the degree of Bachelor of Laws, said applications being for registration on the first day of the Winter Quarter, 1951.

(c) During the same period mentioned above, plaintiff Jack Alexander duly applied for admission as a graduate student to the Graduate School of The University of Ten-
[fol. 9] nessee, for study leading to the degree of Master of Arts in the field of French, said application being for registration on the first day of the Winter Quarter, 1951.

(d) At the time of their abovesaid applications and at all times material herein, plaintiffs, and each of them respectively, were possessed of, and respectively still possess all the scholastic, moral, physical, and other lawful qualifications prescribed by the Constitution and laws of the State of Tennessee, by the defendants and each of them, and by the rules and regulations of The University of Tennessee. They, and each of them respectively, were then, and still are, and at all times material hereto have been, ready, willing and able to pay all lawful, uniform fees and charges, and to conform to all lawful uniform rules and regulations established by lawful authority for admission, as graduate students to the Graduate School, and/or as undergraduate students in law to the College of Law of The University of Tennessee.

9. On or about the 4th day of December, 1950, after plaintiffs, and each of them, according to the tenor of their respective abovesaid applications, had complied with all of the rules and regulations governing the admission of graduate students to the Graduate School, and/or the

admission of undergraduate students in law to the College of Law of The University of Tennessee, and although the defendants do not deny that plaintiffs, and each of them respectively, possessed all of the qualifications entitling them to be admitted, defendant, The Board of Trustees of The University of Tennessee refused and denied each and all of their applications for admission, because of their race or color.

10. Article 11, Section 12, of the Constitution of the State of Tennessee provides, in part, as follows:

> "... And the fund called the common school fund, and all the lands and proceeds thereof ... heretofore by law appropriated by the General Assembly of this State for the use of common schools, and all such as shall hereafter be appropriated, shall remain a perpetual fund, ... and the interest thereof shall be inviolably appropriated to the support and encouragement of common schools throughout the State, and for the equal benefit of all the people thereof. ... *No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school.* ..." (emphasis ours)

Sections 11395, 11396, 11397, of the Code of Tennessee, provides as follows:

> [fol. 10] 11395 6888a37. "... It shall be unlawful for any school, academy, college, or other place of learning to allow white and colored persons to attend the same school, academy, college, or other place of learning. (1901, ch. 7, sec. 1.)"
>
> 11396 6888a38. "... It shall be unlawful for any teacher, professor, or educator in any college, academy, or school of learning, to allow the white and colored races to attend the same school, or for any teacher or educator, or other person to instruct or teach both the white and colored races in the same class, school, or college building, or in any other place or places of learning, or allow or permit the same to be done with their knowledge, consent or procurement. (Ib., sec. 2.)"
>
> 11397 6888a39. "... Any person violating any of the

provisions of this article, shall be guilty of a misdemeanor, and, upon conviction, shall be fined for each offense fifty dollars, and imprisonment not less than thirty days nor more than six months. (Ib., sec. 4, Modified.)"

11. The University of Tennessee was established and chartered under the name of "Trustees of East Tennessee College" in the year 1807 (*Acts of Tennessee, 1807, ch. 64 & ch. 78, as amended by Pub. Acts of 1840, ch. 98,* (changing the name of the institution to "Trustees of East Tennessee University"), *Pub. Acts of 1879, ch. 75* (changing the name of the institution to "The University of Tennessee"), *Pub. Acts of 1909, ch. 48, and Pub. Acts of 1915, ch. 26* (changing the membership of the Board of Trustees)) for the exclusive use and education of qualified white students. The General Assembly of Tennessee, in order to secure the benefits of the Act of Congress of July 2, 1862, ch. 130, 12 Stat. 503 (United States Code, Title 7, secs. 301-305, 307, 308—"Morill" Act appropriating land or land scrip for establishment of agricultural and mechanical colleges in the several states), by Chapter 12 of the Public Acts of Tennessee, Second Session, of 1868-69, established the Tennessee Agricultural College as a part of The University of Tennessee (then East Tennessee University). Section 13 of said Acts of 1868-69 provided as follows:

> ". . . no citizen of this State, otherwise qualified, shall be excluded from the privileges of said University by reason of his race or color, provided *that it shall be the duty of the Trustees of said University, to make such provisions as may be necessary for the separate accom-odation or instruction of any persons of color, who may be entitled to admission.*" (emphasis ours)

By Chapter 18, Public Acts of Tennessee of 1913, all federal funds received under the Acts of Congress for agricultural and industrial education formerly appropriated to The University of Tennessee, and allocated for the separate education of Negroes under Section 13 above, were transferred to the Tennessee Agricultural and Industrial College for Negroes at Nashville.

[fol. 11] Sections 2403.1 and 2403.3 of the Code of Tennessee provide, in part, as follows:

> "2403.1. *Scholarships for colored students.*—The state board of education is hereby authorized and directed to establish scholarships for colored students, payable out of state appropriations made for the agricultural and industrial college for negroes, under the terms and conditions hereinafter set forth. Such scholarships shall be granted to colored students to take professional courses not offered in said agricultural and industrial college for negroes, or other state-maintained institution for negroes, but which are offered for white students in the University of Tennessee . . . (1937, ch. 256, sec. 1,)"
>
> "2403.3. *Educational facilities for negro citizens equivalent to those provided for white citizens.*—The state board of education and the commissioner of education are hereby authorized and directed to provide educational training and instruction for negro citizens of Tennessee equivalent to that provided at the University of Tennessee by the State of Tennessee for white citizens of Tennessee. Such training and instruction shall be made available in a manner to be prescribed by the state board of education and the commissioner of education; provided, that members of the negro race and white race shall not attend the same institution or place of learning. . . . (1941, ch. 43, sec. 1.)"

Throughout the existence of The University of Tennessee, including the Graduate School and the College of Law thereof, defendant, The Board of Trustees of The University of Tennessee has maintained and pursued the uniform policy of restricting admission to said institution to white students.

12. Defendants Cloide Everett Brehm, Eugene A. Waters, William Henry Wicker, and Richmond Frederick Thomason, acting in the premises as the agents of the defendant The Board of Trustees of The University of Tennessee, and as administrative agents and officers of the State of Tennessee have failed and/or refused to consider in good faith

the respective applications of the plaintiffs Gene Mitchell Gray, Lincoln Anderson Blakeney, Joseph Hutch Patterson, and Jack Alexander. Said defendants have advised the plaintiffs both orally and in writing that defendants could not act on or consider plaintiffs' applications for admission to the respective Schools and Colleges of The University of Tennessee because the plaintiffs were Negroes and the laws of Tennessee prevent Negroes and members of the white race from attending the same schools. A letter dated September 6, 1950 from defendant Richmond Frederick Thomason addressed to plaintiff Lincoln Anderson Blakeney is hereto attached as Exhibit "A" to this Complaint, to which reference is hereby made; the attached Exhibit "A" showing the failure and refusal to duly consider the said application of plaintiff Lincoln Anderson Blakeney in good faith and showing a denial of his admis-[fol. 12] sion solely on the ground of race or color. The said Exhibit "A" also expresses in substance and effect the policy of the defendants in failing and/or refusing to consider in good faith the applications of the other plaintiffs herein, and their denial of admission solely on the ground of race or color.

13. The plaintiffs, through their counsel, on 1 December 1950, sought admission to the respective Schools and Colleges of The University of Tennessee by presenting oral arguments to the defendant Cloide Everett Brehm as administrative head or President of The University of Tennessee, as the agent of the defendant The Board of Trustees of The University of Tennessee, and as administrative officer and agent of the State of Tennessee; at which presentation the defendants Eugene A. Waters, William Henry Wicker, and Richmond Frederick Thomason, or their duly authorized representatives were present. Plaintiffs, through their counsel, were advised at the abovesaid conference that they were being denied admission to The University of Tennessee because of the Constitution and Statutes of Tennessee prohibiting Negroes from attending a white school or university, and that before said defendants could admit the plaintiffs, the defendant The Board of Trustees of The University of Tennessee, which is the governing body of said University, would have to so authorize and order.

14. The defendant Cloide Everett Brehm presented to the defendant The Board of Trustees of The University of Tennessee in their meeting held on 4 December, 1950 in Memphis, Tennessee, the aforesaid requests and oral arguments, and also the written requests and arguments of plaintiffs, through their counsel, for admission to The University of Tennessee, as shown by their letter dated 2 December, 1950 addressed to The University of Tennessee, Board of Trustees, a copy of which is hereto attached and marked Exhibit "B" to this Complaint, to which reference is hereby made, and as shown by letter, dated 7 December, 1950, from the defendant Cloide Everett Brehm, hereto attached and marked Exhibit "C" to this Complaint, to which reference is hereby made.

15. Defendant The Board of Trustees of The University of Tennessee, acting as an administrative board or commission of the State of Tennessee under Statutes of said State, has refused to consider duly, properly and lawfully, [fol. 13] and in good faith the applications of the plaintiffs for admission to the respective Schools and Colleges of The University of Tennessee to which they have made application as abovesaid, but instead, has made and established an order excluding, because of their race or color, plaintiffs and each of them, and all other Negroes otherwise qualified, residing in the State of Tennessee, from all colleges, schools, departments and divisions of The University of Tennessee, including but not limited to the Graduate School and College of Law thereof. Acting pursuant to the laws specified in paragraphs 10 and 11 hereof, and in the enforcement of these laws, defendant The Board of Trustees of The University of Tennessee, on or about the 4th day of December, 1950, adopted the following resolution:

> "Whereas, the Constitution and the Statutes of the State of Tennessee expressly provide that there shall be segregation in the education of the races in schools and colleges in the State and that a violation of the laws of the State in this regard subjects the violator to prosecution, conviction, and punishment as therein provided; and,
>
> Whereas, this Board is bound by the Constitutional provision and acts referred to;

Be it therefore resolved, that the applications by members of the Negro race for admission as students into The University of Tennessee be and the same are hereby denied."

A copy of said resolution received by counsel for plaintiffs as an enclosure to the abovesaid letter from defendant Cloide Everett Brehm, marked Exhibit "C", to which reference is hereby made, is attached hereto and marked Exhibit "D" to this Complaint, to which reference is hereby made.

16. Defendants Cloide Everett Brehm, Eugene A. Waters, William Henry Wicker, and Richmond Frederick Thomason refuse to act favorably upon the respective applications of plaintiffs Gene Mitchell Gray, Lincoln Anderson Blakeney, Joseph Hutch Patterson, and Jack Alexander according to the tenor thereof, and will continue to refuse to admit them upon the ground that defendant The Board of Trustees of The University of Tennessee has made and established, and enforces, executes and pursues an order, policy, practice, custom and usage that qualified Negro applicants, because of their race or color, are not eligible for admission as graduate students to the Graduate School, and/or as undergraduate students in law to the College of Law, of The University of Tennessee.

[fol. 14] 17. All defendants have pursued, and are pursuing, the policy, practice, custom and usage of excluding, because of their race or color, plaintiffs, and all other Negroes similarly situated, residing in the State of Tennessee, from all colleges, schools, departments, and divisions of The University of Tennessee, including the Graduate School and the College of Law of The University of Tennessee, pursuant to the order specified in paragraph 15 hereof, and pursuant to the laws of the State of Tennessee specified in paragraphs 10 and 11 hereof.

18. Plaintiffs are informed and believe, and therefore allege upon information and belief, that but for the laws of the State of Tennessee set forth in paragraphs 10 and 11 hereof, defendants would not have established and would not be enforcing or executing the order set forth in paragraph 15 hereof, and would not have pursued and would not be pursuing the policy, practice, custom and usage set forth in paragraph 17 hereof, and would not have de

prived, and would not continue to deprive plaintiffs, and other Negroes similarly situated, of their rights secured by the Constitution and laws of the United States, and hereinbefore and hereinafter more fully set forth.

19. The action of defendants, and each of them, in denying plaintiffs' admission, and the admission of each of them respectively, as graduate students in the Graduate School and/or as undergraduate students in law in the College of Law of The University of Tennessee, and/or in establishing, enforcing or executing against plaintiffs and other Negroes similarly situated the order specified in paragraph 15 hereof, and/or in pursuing against plaintiffs and other Negroes similarly situated the policy, practice, custom and usage specified in paragraph 17 hereof, and/or in enforcing or executing against plaintiffs and other Negroes similarly situated the laws of the State of Tennessee specified in paragraphs 10 and 11 hereof, has denied, and is denying plaintiffs, and other Negroes similarly situated, because of their race or color, their privileges and immunities as citizens of the United States, their liberty and property without due process of law, and the equal protection of the laws, secured by section 1 of the Fourteenth Amendment of the Constitution of the United States, and rights secured by section 41 of Title 8 of the United States Code.

20. Plaintiffs, and other Negroes similarly situated, on whose behalf this suit is brought, are suffering irreparable [fol. 15] injury, and are threatened with irreparable injury in the future by reason of the acts of defendants hereinbefore set forth. They have no plain, adequate or complete remedy to redress the wrongs or illegal acts hereinbefore set forth other than this action for an injunction. Any other remedy to which plaintiffs, and other Negroes similarly situated, could be remitted, would be attended by such uncertainties and delays as to deny substantial relief, would involve a multiplicity of suits, and would cause further irreparable injury, damage, vexation and inconvenience to plaintiffs and other Negroes similarly situated.

21. Defendants have denied and will continue to deny, plaintiff's admission, and the admission of each of them respectively, as graduate students in the Graduate School, and/or as undergraduate students in law in the College of Law, of The University of Tennessee, and/or have en-

forced and executed, and will continue to enforce and execute, against plaintiffs and other Negroes similarly situated, the order specified in paragraph 15 hereof, and/or are pursuing, against plaintiffs and other Negroes similarly situated, and will continue to pursue, the policy, practice, custom and usage specified in paragraph 17 hereof, and/or are enforcing and executing, and will continue to enforce and execute, against plaintiffs and other Negroes similarly situated, the laws of the State of Tennessee specified in paragraphs 10 and 11 hereof, and unless this Court issues a preliminary injunction the rights of plaintiffs and other Negroes similarly situated, as hereinbefore set forth, and their right to attend as graduate students the Graduate School, and/or as undergraduate students in law the College of Law, of The University of Tennessee at the beginning of the Spring Quarter, 1951, will be unprotected and lost.

Wherefore, plaintiffs respectively pray, upon the filing of this complaint:

1. That this Court immediately convene a Three-Judge Court, as required by Title 28, United States Code, section 2281.

2. That this Court enter a preliminary or interlocutory injunction restraining defendants, and each of them, their successors in office, and their agents and employees, from enforcing or executing against plaintiffs, or other Negroes [fol. 16] similarly situated, the order specified in paragraph 15 hereof, upon the ground that said order, as applied to plaintiffs, or other Negroes similarly situated, on whose behalf they sue, denies them their privileges and immunities as citizens of the United States, their liberty and property without due process of law, and the equal protection of the laws, secured by the Fourteenth Amendment of the Constitution of the United States, section 1, and the rights secured by Title 8, United States Code, section 41.

3. That this Court enter a preliminary or interlocutory injunction restraining defendants, and each of them, their successors in office, and their agents and employees, from all action pursuant to the laws of the State of Tennessee specified in paragraphs 10 and 11 hereof which preclude the admission of plaintiffs, and other Negroes similarly situated,

to the colleges, schools, divisions or departments of The University of Tennessee, upon the ground that the said laws, as applied to plaintiffs, or other Negroes similarly situated, on whose behalf they sue, denies them their privileges and immunities as citizens of the United States, their liberty and property without due process of law, and the equal protection of the laws, secured by the Fourteenth Amendment of the Constitution of the United States, section 1, and the rights secured by Title 8, United States Code, section 41.

4. That this Court enter a preliminary or interlocutory injunction restraining defendants, and each of them, their successors in office, and their agents and employees, from enforcing, executing or pursuing against plaintiffs, or other Negroes similarly situated, the policy, practice, custom or usage specified in paragraph 17 hereof, upon the ground that the enforcement, execution or pursuance of said policy, practice, custom or usage against plaintiffs, or other Negroes similarly situated, on whose behalf they sue, denies them their privileges and immunities as citizens of the United States, their liberty and property without due process of law, and the equal protection of the laws, secured by the Fourteenth Amendment of the Constitution of the United States, section 1, and the rights secured by Title 8, United States Code, section 41.

5. That this Court enter a preliminary or interlocutory injunction restraining defendants, and each of them, their successors in office, and their agents and employees, from making any distinction, on the basis of race or color, in the [fol. 17] consideration of plaintiffs or any other applicant, for admission as a student to any college, school, division or department of The University of Tennessee, upon the ground that any such distinction, as made or applied with respect to plaintiffs, or other Negroes similarly situated, on whose behalf they sue, denies them their privileges and immunities as citizens of the United States, their liberty and property without due process of law, and the equal protection of the laws, secured by the Fourteenth Amendment of the Constitution of the United States, section 1, and the rights secured by Title 8, United States Code, section 41.

And plaintiffs respectfully pray further that upon a full hearing hereof:

6. That this Court enter a permanent injunction restraining defendants, and each of them, their successors in office, and their agents and employees, from enforcing or executing against plaintiffs, or other Negroes similarly situated, the order specified in paragraph 15 hereof, and from enforcing or executing against plaintiffs, or other Negroes similarly situated, any other order making any distinction, on the basis of race or color, in the consideration of any applicant for admission as a student to any college, school, division or department of The University of Tennessee, upon the ground that such order, as applied to plaintiffs, or other Negroes similarly situated, on whose behalf they sue, denies them their privileges and immunities as citizens of the United States, their liberty and property without due process of law, and the equal protection of the laws, secured by the Fourteenth Amendment of the Constitution of the United States, section 1, and the rights secured by Title 8, United States Code, section 41.

7. That this Court enter a permanent injunction restraining defendants, and each of them, their successors in office, and their agents and employees, from all action pursuant to the laws of the State of Tennessee specified in paragraphs 10 and 11 hereof which preclude the admission of plaintiffs, and other Negroes similarly situated, to the colleges, schools, divisions or departments of The University of Tennessee, upon the ground that said laws, as applied to plaintiffs, or other Negroes similarly situated, on whose behalf they sue, deny them their privileges and immunities as citizens of the United States, their liberty and property without due process of law, and the equal protection of the laws, secured [fol. 18] by the Fourteenth Amendment of the Constitution of the United States, section 1, and the rights secured by Title 8, United States Code, section 41.

8. That this Court enter a permanent injunction restraining defendants, and each of them, their successors in office, and their agents and employees, from enforcing, executing or pursuing against plaintiffs, or other Negroes similarly situated, the policy, practice, custom or usage specified in paragraph 17 hereof, and from enforcing, executing or

pursuing against plaintiffs, or other Negroes similarly situated, any other policy, practice, custom or usage making any distinction, on the basis of race or color, in the consideration of any applicant for admission as a student to any college, school, division or department of The University of Tennessee, upon the ground that the enforcement, execution or pursuance of said policy, practice, custom or usage against plaintiffs, or other Negroes similarly situated, on whose behalf they sue, denies them their privileges and immunities as citizens of the United States, their liberty and property without due process of law, and the equal protection of the laws, secured by the Fourteenth Amendment of the Constitution of the United States, section 1, and the rights secured by Title 8, United States Code, section 41.

9. That this Court enter a permanent injunction restraining defendants, and each of them, their successors in office, and their agents and employees, from making any distinction, on the basis of race or color, in the consideration of plaintiffs or any other applicant, for admission as a student to any college, school, division or department of The University of Tennessee, upon the ground that any such distinction, as made or applied with respect to plaintiffs or other Negroes similarly situated, on whose behalf they sue, denies them their privileges and immunities as citizens of the United States, their liberty and property without due process of law, and the equal protection of the laws, secured by the Fourteenth Amendment of the Constitution of the United States, section 1, and the rights secured by Title 8, United States Code, section 41.

10. That this Court allow plaintiffs their costs herein, and grant them such further, other, additional or alternative [fol. 19] relief as may appear to the Court to be equitable and just in the premises.

Carl A. Cowan, 101½ W. Vine Avenue, Knoxville, Tennessee, Avon N. Williams, Jr., 511 E. Vine Avenue, Knoxville 15, Tennessee, Z. Alexander Looby, 419-4th Avenue, North, Nashville, Tennessee, Thurgood Marshall, 20 West 40th Street, New York, New York, Attorneys for Plaintiffs.

[fol. 20] *Duly sworn to by Gene Mitchell Gray, et al. Jurats omitted in printing.*

[fol. 21] "EXHIBIT A" TO COMPLAINT

THE UNIVERSITY OF TENNESSEE—KNOXVILLE

Office of the Dean of Admissions

September 6, 1950

Mr. Lincoln Anderson Blakeney, 1322 Jasper Avenue, Knoxville, Tennessee

My dear Mr. Blakeney:

I have received your application for admission to our College of Law and also your transcript from Knoxville College. You are aware, I am sure, of the law in Tennessee which prevents negroes and members of the white race from attending the same schools.

I am suggesting that you write to Mr. W. E. Turner of the State Department of Education, Nashville, Tennessee. Mr. Turner is in charge of negro education for the state and will be able to help you work out your plans for further education.

Very sincerely yours, R. F. Thomason, Dean of Admissions and Records.

RFT:as

[fol. 22] "EXHIBIT B" TO COMPLAINT

C. A. COWAN, ATTORNEY AT LAW

101 1-2 West Vine Avenue, Knoxville, Tennessee

Phone 2-5217—December 2, 1950

The University of Tennessee Board of Trustees, Care of Mr. James P. Hess, Secretary, Peabody Hotel, Memphis, Tennessee

Gentlemen:

Dr. C. E. Brehm, President of University and Board has advised us that he would present request of our clients, four Negroes, for admission to the University of Tennessee. By way of emphasis, we submit the following:

Gene Mitchell Gray duly filed application dated August 1, 1950 for admission to the Graduate School for registration Fall Quarter, September 22, 1950, for study leading to Master of Science Degree in Bio-Chemistry in Field of Chemistry.

Lincoln Anderson Blakeney and Joseph Hutch Patterson duly filed applications dated August 22, 1950 and September 14, 1950 respectively for admission to the College of Law for registration Winter Quarter, January 2, 1951, for study leading to Bachelor of Law Degree.

Jack Alexander duly filed application dated November 22, 1950 for admission to the Graduate School for registration Winter Quarter, January 2, 1951, for study leading to Master of Arts Degree in French.

The State of Tennessee provides graduate study in Bio-Chemistry in Field of Chemistry, legal education and graduate study in French for its white citizens at the University of Tennessee but the State does not provide said educational training for its Negro citizens.

The applicants are bona fide citizens of Tennessee and duly qualified for admission. They have duly requested all proper administrative officers of the University to duly consider their applications and admit them as aforesaid. The applicants have been refused on ground that Tennessee Constitution, at Article XI, Section 12, and certain Statutes

prohibit Negroes and members of the white race from attending the same schools—a denial solely on ground of race or color. The administrative officers further advise that it is a matter of policy for determination by the Board.

[fol. 23] We are hereby requesting and appealing to the Board of Trustees to authorize for acceptance and approval the applications of our clients for admission to the University of Tennessee as aforesaid not later than the first day of the Winter Quarter, 1951.

Irreparable injury and damage have already been suffered by Gene Mitchell Gray in loss of one quarter's work. The others will likewise suffer if not admitted as aforesaid. More than reasonable time has been given to consider applications. Failure of the Board to accept or reject applications at this meeting will be considered a rejection.

We maintain that a failure of the Board to make a decision or a refusal to accept our clients, Negroes, for admission by the University of Tennessee, a governmental agency of the State, on the basis of said State Constitution and Statutes is a denial of equal protection of the laws in violation of the 14th Amendment to the Constitution of the United States by the State of Tennessee. The Constitution and Statutes of Tennessee segregating and discriminating against Negroes, when invoked to deprive Negro applicants of educational facilities equal to those provided by the State for other citizens are unconstitutional and invalid.

The University of Tennessee is bound by decisions of the United States Supreme Court in Sweatt v. Painter et al (Texas); McLaurin v. Oklahoma State Regents; Sipuel v. Board of Regents (Oklahoma) and State of Missouri ex rel Gaines v. Canada.

We strongly urge Board decision favorable to admission of our clients. Would appreciate reply.

Yours very truly, /s/ Carl A. Cowan, /s/ Avon N. Williams, Jr., Attorneys.

[fol. 24] "EXHIBIT C" TO COMPLAINT

THE UNIVERSITY OF TENNESSEE—KNOXVILLE

Office of the President

December 7, 1950

Mr. Carl A. Cowan, Mr. Avon N. Williams, Jr., 101½ West Vine Avenue, Knoxville, Tennessee

Gentlemen:

Concerning the applications of Gene Mitchell Gray, applicant for Graduate School, Lincoln A. Blakeney and Joseph H. Patterson, applicants for School of Law, and Jack Alexander, applicant for Graduate School, respectively, to the University of Tennessee.

Pursuant to conversation which we had on December 1 in the Administration Building relative to the admission of the aforesaid applicants to the respective schools and colleges of The University of Tennessee, and your letter of December 2 addressed to The University of Tennessee Board of Trustees, Care of Mr. James P. Hess, Secretary of the Board of Trustees, I submitted these cases to the Board of Trustees, at their Annual meeting in Memphis December 4. I submitted to them the arguments which you had advanced in our conversation on December 1 as I promised you I would do. The Board, taking into consideration the facts presented in your letter of December 2 and your oral statements to me as President of the University, took the action as indicated on the enclosed Resolution.

Yours very truly /s/ C. E. Brehm, President.

CEB:hlg

Enclosure

[fols. 25-26] "EXHIBIT D" TO COMPLAINT

Whereas, the Constitution and the Statutes of the State of Tennessee expressly provide that there shall be segregation in the education of the races in schools and colleges in the State and that a violation of the laws of the State in this regard subjects the violator to prosecution, conviction, and punishment as therein provided; and,

Whereas, this Board is bound by the Constitutional provision and acts referred to;

Be it therefore resolved, that the applications by members of the Negro race for admission as students into The University of Tennessee be and the same are hereby denied.

[fol. 27] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

[File endorsement omitted.]

ANSWER—Filed February 1, 1951

The defendants for answer to the complaint filed against them in this cause say:

First Defense

These defendants, and each of them, act under and pursuant to the Constitution of the State of Tennessee and the statutes of the said State; and pursuant to Article 11, Section 12, of the Constitution of the State of Tennessee, they are enjoined by law from permitting any white and negro children to be received as scholars together in the same school.

[fol. 28] Second Defense

These defendants, and each of them, act pursuant to the Statutes of the State of Tennessee, and especially Sections 11395, 11396, 11397, of the Code of Tennessee, which provide that it would be unlawful for the defendants to permit the plaintiffs to enter the University of Tennessee, together

with white persons, and provides for the punishment of the defendants for violation of said Statutes.

Third Defense

The plaintiffs are not entitled to the relief sought since under the Code of Tennessee provision has been made to provide professional education for colored persons not offered to them in state colleges for Negroes but offered for white students in the University of Tennessee.

Fourth Defense

The plaintiffs are not entitled to the relief sought in the complaint for the reason that under the Code of Tennessee the State Board of Education and the Commissioner of Education are authorized and directed to provide educational training and instruction for Negro citizens of Tennessee equivalent to that provided by the State for white citizens of Tennessee.

Fifth Defense

The Plaintiffs are not entitled to the relief sought upon the grounds that the Fourteenth Amendment of the Constitution of the United States has been violated since such amendment was intended only to enforce equality of the races before the law and was not intended to abolish distinctions based upon color or to enforce social, as distinguished from political, equality.

[fol. 29] Sixth Defense

The plaintiffs are not entitled to the relief sought in the complaint for the reason that the State of Tennessee under its Constitution and Statutes and under its police power has adopted reasonable regulations for the operation of its institutions based upon established usages, customs and traditions and with a view to the promotion of the comfort of its citizens and the preservation of the public peace and good order, and such regulations being reasonable are not subject to challenge by the plaintiffs.

Seventh Defense

The plaintiffs are not entitled to the relief sought in this complaint for the reason that neither the Fourteenth Amend-

ment of the Constitution of the United States nor Title 8, Section 41, of the United States Code were intended to deprive the states of their rights to adopt all reasonable laws and regulations for the preservation of the public peace and good order under the inherent police power of the state, and for the further reason that if Title 8, Section 41 of the United States Code was intended to deprive the state of such inherent right under its police power, the same is unconstitutional and void.

Eighth Defense.

The plaintiffs are not entitled to the relief sought in this complaint for the reason that all powers and authorities not expressly granted to the Federal Government in the Constitution of the United States are reserved to the states, and neither the Fourteenth Amendment to the Constitution [fol. 30] of the United States nor any other section of the Constitution of the United States authorizes, or was intended to authorize, the denial to the states of their rights as sovereign powers to govern their own institutions and provide reasonable regulations for the promotion of the comfort of their citizens and the preservation of the public peace and good order, nor was the Fourteenth Amendment or any other provision of the Constitution of the United States intended to authorize the Federal Government or any of its arms or branches to take away from the states those rights.

Ninth Defense

Plaintiffs are not entitled to the relief sought in the complaint for the reason that there is no equity on the face of the bill.

Walker & Hooker, s/ By John J. Hooker, s/ By K. Harlan Dodson, Jr., 1106 Nashville Trust Building, Nashville, Tennessee, Attorneys for Defendants.

[fol. 31] IN UNITED STATES DISTRICT COURT

[Title omitted]

[File endorsement omitted.]

MOTION FOR JUDGMENT ON THE PLEADINGS—Filed February 12, 1951

The plaintiffs, Gene Mitchell Gray, Lincoln Anderson Blakeney, Joseph Hutch Patterson and Jack Alexander, in their own behalf and also on behalf of all Negro citizens of the United States who are citizens and residents of the State of Tennessee, similarly qualified, situated and affected, move the Court for judgment on the pleadings in their favor in the above cause on the grounds that the pleadings show that there is no dispute and issue as to any material fact, and that the plaintiffs are entitled to judgment as a matter of law.

Gene Mitchell Gray, Lincoln Anderson Blakeney, Joseph Hutch Patterson, Jack Alexander, By s/ Carl A. Cowan, 101½ W. Vine Avenue, Knoxville, Tennessee, s/ Avon N. Williams, Jr., 511 E. Vine Avenue, Knoxville 15, Tennessee, s/ Z. Alexander Looby, 419-4th Avenue, North, Nashville, Tennessee, s/ Thurgood Marshall, 20 West 40th Street, New York, New York, Solicitors.

Certificate of service (omitted in printing).

[fol 32] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DESIGNATING THREE-JUDGE COURT—February 20, 1951

The Honorable Robert L. Taylor, United States District Judge for the Eastern District of Tennessee, to whom the application for a preliminary and permanent injunction and other relief in the above entitled cause has been presented, has notified me as Chief Judge of the Sixth Circuit of the Application.

I do therefore hereby, in compliance with Title 28, Sec. 2284, United States Code, designate The Honorable Shackelford Miller, Jr. United States Circuit Judge for the Sixth Circuit, and The Honorable Leslie R. Darr, United States District Judge for the Eastern District of Tennessee, to serve with The Honorable Robert L. Taylor as members of the court to hear and determine the above entitled action or proceeding.

Dated at Knoxville, Tennessee, this 20th day of February, 1951.

Xen Hicks, Chief Judge.

[fol. 33] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF HEARING

Notice is hereby given that Plaintiff's Motion for Summary Judgment is set for hearing before a Three-Judge Court at Knoxville, Tennessee, on Thursday: March 1, 1951, at 9:30 A. M., E. S. T.

Carroll Cate, Clerk, U. S. District Court.

Copy of this Notice mailed all interested persons by Clerk on February 21, 1951, at 9 A. M. List attached.

Carroll Cate, Clerk. (Seal)

[fol 34] Carl A. Cowan, Atty.
101½ W. Vine Ave.
Knoxville, Tennessee
Avon N. Williams, Jr., Atty.
511 E. Vine Ave.
Knoxville 15, Tennessee.
Z. Alexander Looby, Atty.
419—4th Ave., North
Nashville, Tennessee
Thurgood Marshall, Atty.
20 West 40th Street
New York, New York
John J. Hooker, Atty.
Nashville Trust Bldg.
Nashville 3, Tennessee

K. Harlan Dodson, Jr., Atty.
Nashville Trust Bldg.
Nashville, Tennessee
Walker & Hooker, Atty.
Nashville Trust Bldg.
Nashville 3, Tennessee

Governor Gordon Browning
Nashville, Tennessee

Roy Beeler
Attorney General
State of Tennessee
Nashville, Tennessee

John C. Baugh, Atty.
University of Tennessee
Knoxville, Tennessee

The University of Tennessee
c/o Cloide Everett Brehm, President
University of Tennessee
Knoxville, Tennessee

Cloide Everett Brehm
University of Tennessee
Knoxville, Tennessee

Eugene A. Waters
University of Tennessee
Knoxville, Tennessee

William Henry Wicker
University of Tennessee
Knoxville, Tennessee

Richmond Frederick Thomason
University of Tennessee
Knoxville, Tennessee

[fol. 35] Cloide Everett Brehm
President, The University of Tennessee
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Nashville, Tennessee
James A. Barksdale
Commissioner of Education of the State of Tennessee
Nashville, Tennessee
Edward Jones
Commissioner of Agriculture of the State of Tennessee
Nashville, Tennessee
Frank R. Ahlgren
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Memphis, Tennessee
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Memphis, Tennessee
Clyde B. Austin
Greeneville, Tennessee
Harry S. Berry
Hendersonville, Tennessee
W. P. Cooper
Shelbyville, Tennessee
E. W. Eggleston
Hilldale Drive
Nashville, Tennessee
James T. Granbery
Brentwood, Tennessee
Sam J. McAllester
James Building
Chattanooga, Tennessee
I. B. Tigrett
Jackson, Tennessee
Charles R. Voltz
Ripley, Tennessee

[fol. 36] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF RESETTING THE HEARING

On account of the death of Hon. Seth Walker, one of the defendants' chief counsel, this case has been re-set for hearing on Motion for Summary Judgment for Tuesday; March 13, 1951, at 9:30 A. M., E. S. T.

Carroll Cate, Clerk, U. S. District Court.

Copy of this Notice mailed by Clerk on February 27, 1951, to all interested persons per attached list.

Carroll Cate, Clerk (Seal).

[fol. 37] Carl A. Cowan, Atty.
101½ W. Vine Ave.
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511 E. Vine Ave.
Knoxville 15, Tennessee.
Z. Alexander Looby, Atty.
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K. Harlan Dodson, Jr., Atty.
Nashville Trust Bldg.
Nashville, Tennessee
Walker & Hooker, Atty.
Nashville Trust Bldg.
Nashville 3, Tennessee
Governor Gordon Browning
Nashville, Tennessee
Roy Beeler
Attorney General
State of Tennessee
Nashville, Tennessee

John C. Baugh, Atty.
University of Tennessee
Knoxville, Tennessee

The University of Tennessee
c/o Cloide Everett Brehm, President
University of Tennessee
Knoxville, Tennessee

Cloide Everett Brehm
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Knoxville, Tennessee

Eugene A. Waters
University of Tennessee
Knoxville, Tennessee

William Henry Wicker
University of Tennessee
Knoxville, Tennessee

Richmond Frederick Thomason
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Nashville, Tennessee
James T. Granbery
Brentwood, Tennessee
Sam J. McAllester
James Building
Chattanooga, Tennessee
I. B. Tigrett
Jackson, Tennessee
Charles R. Voltz
Ripley, Tennessee

[fol. 39] IN UNITED STATES DISTRICT COURT

ORDER OF HEARING ON MOTION FOR JUDGMENT ON THE PLEADINGS BY THREE-JUDGE COURT—Entered March 3, 1951

Came the parties by their attorneys and this case coming on to be heard by a Three-Judge Court on plaintiffs' motion for summary judgment and the Court having heard the argument of counsel on said motion took the case under advisement and directed parties to file briefs, defendants' brief to be filed within three days and plaintiffs' reply brief to be filed within three days after receipt of defendants' brief.

[fol. 40] UNITED STATES DISTRICT COURT

Civil Action No. 1567

GENE MITCHELL GRAY, LINCOLN ANDERSON BLAKENEY, JOSEPH HUTCH PATTERSON and JACK ALEXANDER, *Plaintiffs*,

v.

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF TENNESSEE, etc., et al., *Defendants*

[File endorsement omitted.]

OPINION—Filed April 13, 1951

Before MILLER, Circuit Judge, DARR and TAYLOR, District Judges.

MILLER, Circuit Judge. The plaintiffs by this action seek to enjoin the Board of Trustees of the University of Tennessee, the University of Tennessee, and certain of its officers from denying them admission to the Graduate School and to the College of Law of the University because they are members of the Negro race.

In brief, the complaint alleges that the plaintiffs are citizens of the United States and of the State of Tennessee, are residents of and domiciled in the City of Knoxville, State of Tennessee, and are members of the Negro race; that plaintiffs, Gene Mitchell Gray and Jack Alexander, are fully qualified for admission as graduate students to the Graduate School of the University; that plaintiffs Lincoln Anderson Blakeney and Joseph Hutch Patterson are fully qualified for admission as undergraduate students in law to the College of Law of the University; that the four plaintiffs are ready, willing and able to pay all lawful charges and fees, and to comply with all lawful rules and regulations, requisite to their admission; that the University of Tennessee is a corporation duly organized and existing under the laws of Tennessee, was established and [fol. 41] is operated as a State function by the State of Tennessee, with two of its integral parts or departments being the Graduate School and the College of Law; that it operates as an essential part of the public school system

of the State of Tennessee, maintained by appropriations from the public funds of said State raised by taxation upon the citizens and taxpayers of the State including the plaintiffs; that there is no other institution maintained or operated by the State at which plaintiffs might obtain the graduate or legal education for which they have applied to the University of Tennessee; that the plaintiffs Gene Mitchell Gray and Jack Alexander applied for admission as graduate students to the Graduate School of the University and that the plaintiffs Lincoln Anderson Blakeney and Joseph Hutch Patterson applied for admission as undergraduate students in law to the College of Law of the University; and that on or about December 4, 1950, the Board of Trustees of the University refused and denied each and all of their applications for admission because of their race or color, relying upon the Constitution and Statutes of the State of Tennessee providing that there shall be segregation in the education of the races in the schools and colleges in the State. Plaintiffs contend that the action of the defendants in denying them admission to the University denies the plaintiffs, and other Negroes similarly situated, because of their race or color, their privileges and immunities as citizens of the United States, their liberty and property without due process of law, and the equal protection of the laws, secured by the 14th Amendment of the Constitution of the United States and by Section 41, Title 8, United States Code.

The defendants, by answer, state that they are acting under and pursuant to the Constitution and the Statutes of the State of Tennessee, by which they are enjoined from permitting any white and negro children to be received as scholars together in the same school; that provision has been made by Tennessee Statutes to provide professional [fol. 42] education for colored persons not offered to them in state colleges for Negroes but offered for white students in the University of Tennessee; that the State of Tennessee, under its Constitution and Statutes and under its police power, has adopted reasonable regulations for the operation of its institutions based upon established usages, customs and traditions, and such regulations being reasonable are not subject to challenge by the plaintiffs;

and that the 14th Amendment of the Constitution of the United States did not authorize the Federal Government to take away from the State the right to adopt all reasonable laws and regulations for the preservation of the public peace and good order under the inherent police power of the State.

The plaintiffs requested a hearing by a three-judge court under the provisions of Title 28 U. S. Code, Section 2281, and moved for judgment on the pleadings in that the pleadings showed that there was no dispute as to any material fact and they were entitled to judgment as a matter of law. The present three-judge court was designated and in due course the case was argued before it.

We are of the opinion that the case is not one for decision by a three-judge court. Title 28 U. S. Code, Section 2281, requires the action of a three-judge court only when an injunction is issued restraining the action of any officer of the State upon the ground of the unconstitutionality of such statute. We are of the opinion that the case presents a question of alleged discrimination on the part of the defendants against the plaintiffs under the equal protection clause of the 14th Amendment, rather than the unconstitutionality of the statutory law of Tennessee requiring segregation in education. As such, it is one for decision by the District Judge instead of by a three-judge court.

The plaintiffs rely chiefly upon the decisions of the Supreme Court in *Missouri* v. *Canada*, 305 US 337, *Sipuel* v. *Board of Regents*, 332 US 631, *Sweatt* v. *Painter*, 339 US [fol. 43] 629 and *McLaurin v. Oklahoma State Regents*, 339 US 637, in which State Universities were required to admit qualified negro applicants. In each of those cases the plaintiff was granted the right to be admitted to the State University on equal terms with white students because of the failure of the State to furnish to the negro applicant educational facilities equal to those furnished white students at the State University. The rulings therein are based upon illegal discrimination under the equal protection clause of the 14th Amendment, not upon the unconstitutionality of a State statute. In *Sweatt* v. *Painter*, supra, the Court expressly pointed out (339 U. S. at Page 631) that it was eliminating from the case the question of

constitutionality of the State statute which restricted admission to the University to white students. Those cases did not change the rule, previously laid down by the Supreme Court, that State legislation requiring segregation was not unconstitutional because of the feature of segregation, *Plessy* v. *Ferguson*, 163 US 537; *McCabe* v. *Atchison T. & S. F. Ry. Co.*, 235 U. S. 151, provided equal facilities were furnished to the segregated races. In *Sweatt* v. *Painter*, supra, the Supreme Court declined (339 U. S. at Page 636) to re-examine its ruling in *Plessy* v. *Ferguson*, supra. In *Berea College* v. *United States*, 211 US 45, and *Gong Lum* v. *Rice*, 275 US 78, state segregation statutes dealing specifically with education were not held to be unconstitutional. The validity of such legislation was recognized in *Missouri* v. *Canada*, supra, wherein the Court stated (305 U. S. at page 344)—"The State has sought to fulfill that obligation by furnishing equal facilities in separate schools, a method the validity of which has been sustained by our decisions." In that case, as well as in *Sweatt* v. *Painter*, supra, there were State statutes which required segregation for the purpose of higher education, but the decisions in those cases did not declare those statutes unconstitutional.

[fol. 44] By Chapter 43 of the Public Acts of 1941, the State of Tennessee authorized and directed the State Board of Education and the Commissioner of Education to provide educational training and instruction for negro citizens of Tennessee equivalent to that provided at the University of Tennessee by the State of Tennessee for white citizens of Tennessee, such training and instruction to be made available in a manner to be prescribed by the State Board of Education and the Commissioner of Education, provided, that the members of the negro race and white race should not attend the same institution or place of learning. The Supreme Court of Tennessee has held that Act to be mandatory in character. *State ex rel. Michael* v. *Witham*, 179 Tenn. (15 Beeler) 250. Such legislation, specifically requiring equal educational training and instruction for white and negro citizens, appears to go further than did some of the State Statutes involved in the Supreme Court cases above referred to, which were not declared unconsti-

tutional in those cases. In our opinion, this case does not turn upon the unconstitutionality of the state statutes, but presents the same issue as was presented to the Supreme Court in *Missouri* v. *Canada*, supra, *Sipuel* v. *Board of Regents*, supra, *Sweatt* v. *Painter*, supra, and *McLaurin* v. *Oklahoma State Regents*, supra, namely, the question of discrimination under the equal protection clause of the 14th Amendment. Accordingly, this case, at least in its present stage, is one for decision by the District Judge, in the district of its filing, on the issue of alleged discrimination against the plaintiffs under the equal protection clause of the 14th Amendment. Such an issue does not address itself to a three-judge court. *Ex parte Bransford*, 310 US 354; *Ex parte Collins*, 277 US 565; *Rescue Army* v. *Municipal Court*, 331 US 549, 568-574.

The two Judges designated by the Chief Judge of the Circuit to sit with the District Judge in the hearing and decision of this case do now accordingly withdraw from the case, which will proceed in the District Court where it was originally filed. See Lee v. Roseberry, 94 Fed Supp. 324, 328.

[fol. 45] UNITED STATES DISTRICT COURT

GENE MITCHELL GRAY, LINCOLN ANDERSON BLAKENEY, JOSEPH HUTCH PATTERSON AND JACK ALEXANDER, *Plaintiffs*,

v.

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF TENNESSEE, etc., et al., *Defendants*

ORDER BY WHICH TWO JUDGES WITHDREW—April 13, 1951

Before MILLER, Circuit Judge, DARR and TAYLOR, District Judges.

This case was heard on the record, briefs and argument of counsel for respective parties.

And the Court being of the opinion that the issue involved is alleged unjust discrimination against the plaintiffs under the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States, and

not the constitutionality of certain statutes of the State of Tennessee, referred to in the pleadings;

And such issue not being one for decision by a three-judge court under the provisions of Section 2281, Title 28, U. S. Code;

It is ordered that the two Judges designated by the Chief Judge of the Circuit to sit with the District Judge, in whose District the action was filed, do now withdraw from the case, and that the case proceed before said District Judge in the District of its filing.

s/ Shackelford Miller, Jr., Circuit Judge, s/ Leslie R. Darr, District Judge, s/ Robt. L. Taylor, District Judge.

[fol. 46] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

GENE MITCHELL GRAY ET AL.

v.

UNIVERSITY OF TENNESSEE ET AL.

Civil No. 1567

OPINION—Filed April 20, 1951

This case was heard by a three judge court on the record, briefs and argument of counsel for the respective parties on plaintiffs' motion for summary judgment in their favor under Rule 56 of the Federal Rules of Civil Procedure.

In an opinion by Circuit Judge Miller, in which Chief District Judge Darr and District Judge Taylor of the Eastern District of Tennessee, concurred, the Court held that the issue involved is alleged unjust discrimination against the plaintiffs under the equal protection clause of the Fourteenth Amendment of the Constitution of the United States and not the constitutionality of the Tennessee statutes and constitutional provisions referred to in the complaint. Following this opinion and the order entered pursuant thereto, Judge Miller and Judge Darr with

drew from the case, which is now before this Court for decision on the motion.

Plaintiffs Gray and Alexander have applied for admission to the Graduate School and Plaintiffs Blakeney and Patterson have applied for admission to the College of Law, of the University of Tennessee. All admittedly are qualified for admission, except for the fact that they are negroes.

[fol. 47] The matter of their applications was referred by University authorities to the Board of Trustees, who disposed of the matter by the following resolution:

> "Whereas, the Constitution and the statutes of the State of Tennessee expressly provide that there shall be segregation in the education of the races in schools and colleges in the State and that a violation of the laws of the State in this regard subjects the violator to prosecution, conviction, and punishment as therein provided; and,
>
> "Whereas, this Board is bound by the Constitutional provision and acts referred to;
>
> "Be it therefore resolved, that the applications by members of the Negro race for admission as students into The University of Tennessee be and the same are hereby denied."

Following the indicated action by the Board of Trustees, plaintiffs filed their joint complaint for themselves and on behalf of all negro citizens similarly situated, praying for a temporary and, after hearing, a permanent order restraining the defendants from executing the exclusion order of the Board of Trustees against the plaintiffs, or other negroes similarly situated, and from all action pursuant to the constitution and statutes of the State of Tennessee, and the custom or usage of the defendants, respecting the requirement of segregation of whites and negroes in state-supported educational institutions and exclusion of negroes from the University of Tennessee, their references being to Article 11, sec. 12, of the state constitution, to sections 2403.1, 2403.3, 11395, 11396, and 11397 of the Tennessee Code, and the custom and usage of defendants of excluding negroes from all colleges, schools,

departments, and divisions of the University of Tennessee, including the Graduate School and the College of Law.

Defenses interposed are nine in number, but in substance they are these: That defendants, in rejecting the applications of the plaintiffs, were and are obeying the mandates of the segregation provisions of the constitution and laws of the State of Tennessee; that those provisions are in exercise of the police powers reserved to the states and are valid, the Fourteenth Amendment and laws enacted thereunder to the contrary notwithstanding, and that these plaintiffs have no standing to bring this action for the [fol. 48] reason that they have not exhausted their administrative remedies under the equivalent facilities act of 1941, Code section 2403.3. The plaintiffs, after alleging in their complaint that the University of Tennessee maintains a Graduate School and a College of Law which offer to white students the courses sought by plaintiffs' make the following specific allegation, which defendants, for failure to deny, admit: "There is no other institution maintained or operated by the State of Tennessee at which plaintiffs might obtain the graduate and/or legal education for which they respectively have applied to The University of Tennessee."

It is, of course, recognized that the Constitution of the United States is one of enumerated and delegated powers. To remove original doubt as to the character of federal powers, the states adopted the Tenth Amendment, which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Constitution contains no specific delegation of police powers, and those powers are accordingly reserved. But a glance discloses that, in relation to the Tenth Amendment, the Constitution contains two groups of powers, namely, the previously-delegated powers and the subsequently-delegated powers. By adoption of the Fourteenth Amendment, following adoption of the Tenth Amendment, the states consented to limitations upon their reserved powers, particularly in the following respects: ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . ."

It is recognized that "the police power of a state extends beyond health, morals and safety, and comprehends the duty, *within constitutional limitations*, to protect the well-being and tranquility of a community." Kovacs v. Cooper, 336 U. S. 77, 83. (Italics supplied). States "have power [fol. 49] to legislate against what are found to be injurious practices in their internal commercial and business affairs, *so long as their laws do not run afoul of some specific constitutional prohibition, or of some valid federal law.*" Whitaker v. North Carolina, 335 U. S. 525, 536. (Italics supplied). In the foregoing quotations, the italicized portions point up the limitation upon the exercise of a state's police powers.

Segregation by law may, in a given situation, be a valid exercise of the state's police powers. It has been so recognized with respect to schools. Gong Lum et al v. Rice et al, 275 U. S. 78. Also, as to segregation on intrastate trains. Plessy v. Ferguson, 163 U. S. 537. But where enforcement by the state of a law ran afoul of the Fourteenth Amendment by denying members of a particular race or nationality equal rights as to property or the equal protection of the laws, the state action has been condemned. This was the result where state law discriminated against aliens as to the privilege of employment. Truax v. Raich, 239 U. S. 33. The same result was reached as to enforcement of restrictive covenants in deeds, Shelley et ux v. Kraemer et ux, 334 U. S. 1; in the housing segregation cases, Richmond v. Deans, 4 Cir., 37 F. 2d 712, affirmed 281 U. S. 704; Buchanan v. Warley, 245 U. S. 60; and in the cases where segregation has resulted in inequality of educational opportunities for negroes, Sweatt v. Painter et al, 339 U. S. 629; McLaurin v. Oklahoma State Regents, 339 U. S. 637. From these cases it appears to be well settled that exercise of the state's police powers ceases to be valid when it violates the prohibitions of the Fourteenth Amendment. The defense on this ground, therefore, fails.

The second question is whether the plaintiffs have present standing to bring this action. To understand the defense interposed here, it is desirable to look at the historical background of the act of 1941, of which the Court takes judicial notice.

[fol. 50] On October 18, 1939, six negroes applied for admission to the University of Tennessee, four to the Graduate Department and two to the College of Law. Being denied admission, they filed their separate petitions for mandamus in the Chancery Court of Knox County, Tennessee, to require their admission. Following denial of the petitions in a consolidated proceeding, an appeal was taken to the Supreme Court of Tennessee, where the action of the Chancellor was affirmed by opinion filed November 7, 1942. State ex rel. Michael et al v. Witham et al, 179 Tenn. 250. The case was not disposed of by the Chancellor on its merits, but on the ground that it had become moot. While the case was pending in the Chancery Court, the state legislature enacted the act of 1941, now carried in the Code as sec. 2403.3, and entitled, *Educational facilities for negro citizens equivalent to those provided for white citizens:*

> "The state board of education and the commissioner of education are hereby authorized and directed to provide educational training and instruction for negro citizens of Tennessee equivalent to that provided at the University of Tennessee by the State of Tennessee for white citizens of Tennessee. Such training and instruction shall be made available in a manner to be prescribed by the state board of education and the commissioner of education; provided, that members of the negro race and white race shall not attend the same institution or place of learning. The facilities of the Agricultural and Industrial State College, and other institutions located in Tennessee, may be used when deemed advisable by the state board of education and the commissioner of education, insofar as the facilities of same are adequate."

Following enactment of the statute a supplemental answer was filed in the case then pending, in which it was averred

that pursuant to the Act certain committees had been appointed by the state board of education, with instructions to report at the board's next regular meeting, an averment which suggested that the act of 1941 was to be made operative expeditiously.

The Supreme Court of Tennessee, in affirming the Chancellor's dismissal of the consolidated case, construed the act of 1941 to be mandatory in character. "No discretion whatever is vested in the State Board of Education under the Act as to the performance of its mandates. The manner of providing educational training and instruction for [fol. 51] negro citizens equivalent to that provided for white citizens at the University of Tennessee is for the Board of Education to determine in its sound discretion, but the furnishing of such equivalent instruction is mandatory." State ex rel. Michael et al v. Witham et al, 179 Tenn. 250, 257.

The court also said at page 257: "Upon the demand of a negro upon the State Board of Education for training and instruction in any branch of learning taught in the University of Tennessee, it is the duty of the Board to provide such negro with equal facilities of instruction in such subjects as that enjoyed by the students of the University of Tennessee. The State Board of Education is entitled to reasonable advance notice of the intention of a negro student to require such facilities. . . . No such advance notice by applicants is shown in the record."

At page 258, the court further said: "It does not appear that the State Board of Education is seeking in any way to evade the performance of the duties placed upon it by Chapter 43, Public Acts 1941, or that it is lacking sufficient funds to carry out the purposes of the Act. The state having provided a full, adequate and complete method by which negroes may obtain educational training and instruction equivalent to that provided at the University of Tennessee, a decision of the issues made in the consolidated causes becomes unnecessary and improper. The legislation of 1941 took no rights away from appellants; on the contrary the right to equality in education with white students was specifically recognized and the method by which those rights would be

satisfied was set forth in the legislation. What more could be demanded?"

By failure to deny the allegations of the complaint, de- [fol. 52] fendants admit that the directive, though mandatory, has not been carried out. Nevertheless, it is urged by defendants that these plaintiffs have no standing here until they have petitioned the state board of education to furnish the equivalent educational training and instruction for negroes provided for by the act. The Supreme Court of the state noted in its opinion that the then applicants for admission to the University of Tennessee had given to the state board "no such advance notice" of a desire to be furnished facilities under the act. That omission is understandable here for the reason that their applications for admission to the University of Tennessee had not been finally disposed of by the courts, and the need of their applying to the state board had not been established.

Since the enactment of the Act of 1941 and the decision in State ex rel. Michael et al v. Witham et al, 179 Tenn. 250, the Supreme Court of the United States has emphasized the pronouncement of one of its older cases as to a particular element of equal protection. In Missouri ex rel. Gaines v. Canada, 305 U. S. 337, it appeared that Lincoln University, a state-supported school for negroes, intended to establish a law school. As to this intention the court said: ". . . it cannot be said that a mere declaration of purpose, still unfulfilled, is enough." Missouri ex rel. Gaines v. Canada, 305 U. S. 337, 346. In the same case, at page 351, the court said: "Here, petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the state there afforded for persons of the white race, . . ." Later declarations indicate that the two quotations should be read together and that when so read they state the requirement of equality of opportunity to be personal and immediate.

In Fisher v. Hurst, 333 U. S. 147, the court emphasized its position that equality of opportunity in education means present equality, not the promise of future equality. This reemphasized the necessity of equality as to time of an earlier decision, where the court said: "The State must

[fol. 53] provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applications of any other group." Sipuel v. Board of Regents of the University of Oklahoma et al, 332 U. S. 631. In the holding in McLaurin v. Oklahoma State Regents, 339 U. S. 637, 642, the court said: "We conclude that the conditions under which this appellant is required to receive his education deprive him of his personal and present right to the equal protection of the laws." That equality of educational opportunity for negroes means present equality was emphasized once more in Sweatt v. Painter et al, 339 U. S. 629, 635: "This Court has stated unanimously that 'The State must provide (legal education) for (petitioner) in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group'. Sipuel v. Board of Regents, 332 U. S. 631, 633." In view of these recent declarations of the Supreme Court of the United States, this Court is forced to conclude that the defense of exhaustion of administrative remedies fails.

The Court finds that under the Gaines, Sipuel, Sweatt and McLaurin cases heretofore cited, these plaintiffs are being denied their right to the equal protection of the laws as provided by the Fourteenth Amendment and holds that under the decisions of the Supreme Court the plaintiffs are entitled to be admitted to the schools of the University of Tennessee to which they have applied for admission. Believing that the University authorities will either comply with the law as herein declared or take the case up on appeal, the Court does not deem an injunctive order presently to be appropriate. The case, however, will be retained on the docket for such orders as may seem proper when it appears that the applicable law has been finally declared.

/s/ Robt. L. Taylor, United States District Judge.

[fol. 54] UNITED STATES DISTRICT COURT

[Title omitted]

[File endorsement omitted.]

PETITION FOR APPEAL—Filed May 7, 1951

Considering themselves aggrieved by the order and decree of this Court entered on April 13, 1951, Gene Mitchell Gray, Lincoln Anderson Blakeney, Joseph Hutch Patterson and Jack Alexander, plaintiffs herein, do hereby pray that an appeal be allowed to the Supreme Court of the United States, from said order and decree and from each and every part thereof; that citation be issued in accordance with law; that an order be made with respect to the appeal bond to be given by said plaintiffs and that the amount of security be fixed by the order allowing the appeal, and that the material part to the record, proceedings and paper upon which said order and decree was based, duly authenticated, be sent to the Supreme Court of the United States [fol. 55] in accordance with the rules in such cases made and provided.

Respectfully submitted, Carl A. Cowan, 101½ W. Vine Avenue, Knoxville, Tennessee, Avon N. Williams, Jr., 511 E. Vine Avenue, Knoxville 15, Tennessee, Z. Alexander Looby, 419 Fourth Ave., North Nashville, Tennessee, Thurgood Marshall, 20 West 40th Street, New York 18, New York, Robert L. Carter, 20 West 40th Street, New York 18, New York, Counsel for Plaintiffs-Appellants.

[fols. 56-57] STATEMENT REQUIRED BY PARAGRAPH 2, RULE 12 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

[Omitted in printing.]

[fol. 58] UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—May 7, 1951

Gene Mitchell Gray, Lincoln Anderson Blakeney, Joseph Hutch Patterson and Jack Alexander, having made and filed their petition praying for an appeal to the Supreme Court of the United States, from the order and decree of this Court in this cause entered on April 13, 1951, and each and every part thereof, and having presented their Assignment of Errors and Prayer for Reversal and their statement as to the jurisdiction of the Supreme Court of the United States on appeal, pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

Now, therefore, it is hereby ordered that said appeal be and the same is hereby allowed as prayed for.

It is further ordered that the amount of the appeal bond be and the same is hereby fixed in the sum of $250.00 with [fol. 59] good and sufficient security and shall be conditioned as may be required by law.

It is further ordered that citation shall issue in accordance with law.

Approved for entry:

Leslie R. Darr, District Judge.

[fols. 60-61] UNITED STATES DISTRICT COURT

Citation in usual form showing service on John J. Hooker and K. Harlan Dodson, Jr., omitted in printing.

[fol. 62] UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed May 7, 1951

[File endorsement omitted.]

Gene Mitchell Gray, Lincoln Anderson Blakeney, Joseph Hutch Patterson and Jack Alexander, plaintiffs in the above-entitled cause, in connection with their appeal to the Supreme Court of the United States, hereby file the following Assignment of Errors upon which they will rely in their prosecution of said appeal from the order and decree of the District Court entered on April 13, 1951:

1. The District Court erred in refusing to grant plaintiffs' motion for judgment on the pleadings against defendants for the reason that the order of defendants refusing to admit plaintiffs to the University of Tennessee solely because of their race and color was based upon the statutes and constitution of the State of Tennessee, in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

[fol. 63] 2. The District Court erred in holding that the issues here raised did not go to the constitutionality of the statutes of the State of Tennessee and of the order of the defendants as an administrative agency of the State, for the reason that in the order refusing plaintiffs' admission and their answer to the complaint, defendants seek to justify their refusal to admit plaintiffs to the University of Tennessee because of their race and color on the grounds that the Constitution and statutes of the State of Tennessee make mandatory the denial of plaintiffs' applications.

3. The District Court erred in refusing to grant plaintiffs' prayer for a temporary and permanent injunction as prayed for in their complaint.

4. The District Court erred in holding that this cause did not come within the jurisdiction of a district court of three judges as such jurisdiction is defined in Title 28, United States Code, section 2281.

5. The District Court erred in ordering the dissolution of the three-judge court and in referring this matter for hearing before a United States District Court of one judge, for the reason that under Title 28, United States Code, section 2281, one district judge is without power and authority to grant the affirmative injunctive relief herein prayed for since such injunctive relief could only be granted on the grounds that defendants' order denying plaintiffs' admission to the University of Tennessee, and Article 11, section 12 of the Constitution of the State and sections 11395, 11396, and 11397 of the Code of Tennessee on which said order was based, are unconstitutional as applied in this case.

Wherefore, plaintiffs Gene Mitchell Gray, Lincoln Anderson Blakeney, Joseph Hutch Patterson and Jack Alexander [fol. 64] pray that the order and decree of the District Court entered on April 13, 1951, be reversed, and for such other relief as the Court may deem fit and proper.

Carl A. Cowan, 101½ W. Vine Avenue, Knoxville, Tenn, Avon N. Williams, Jr., 511 E. Vine Avenue, Knoxville 15, Tenn., Z. Alexander Looby, 419 Fourth Avenue, North Nashville, Tennessee, Thurgood Marshall, 20 West 40th St., New York 18, N. Y., Robert L. Carter, 20 West 40th St., New York 18, N. Y., Counsel for Plaintiffs-Appellants.

[fols. 65-92] AFFIDAVIT OF SERVICE—(Omitted in printing)

[fols. 93-94] UNITED STATES DISTRICT COURT

PRAECIPE—(Omitted in printing)

[fol. 95] CLERK'S CERTIFICATE OF CASH MONEY DEPOSIT AS SECURITY FOR COSTS OF APPEAL—(Omitted in printing)

[fol. 96] SUPPLEMENTARY PRAECIPE—(Omitted in printing)

[fol. 97] AFFIDAVIT OF SERVICE OF ORDER AMENDING ORDER ALLOWING APPEAL, CLERK'S CERTIFICATE OF CASH MONEY DEPOSIT, AND SUPPLEMENTARY PRAECIPE ON ATTORNEYS FOR DEFENDANTS-APPELLEES—(Omitted in printing)

[fols. 98-101] UNITED STATES DISTRICT COURT

[Title omitted]

ORDER AMENDING ORDER ALLOWING APPEAL—May 14, 1951

In this cause, on application of the plaintiffs-appellants and for good cause shown, it is hereby ordered that the Order allowing the Appeal heretofore entered in Civil Order Book 8 page 1030 be and the same is hereby amended by striking out the third paragraph of said Order, to-wit: "It is further ordered that the amount of the appeal bond be and the same is hereby fixed in the sum of $250.00 with good and sufficient security and shall be conditioned as may be required by law.", and substituting in lieu thereof the following: "It is further ordered that the amount of the appeal bond be and the same is hereby fixed in the sum of $250.00 with good and sufficient security and shall be conditioned as may be required by law, or in lieu of said appeal bond, that security for costs of said appeal shall be given by cash money deposit in the sum of $250.00 and shall be conditioned as may be required by law."

Approved for entry:

Leslie R. Darr, District Judge

Approved:

Carl A. Cowan, Attorney for Plaintiffs-Appellants.

[fols. 102-103] AFFIDAVIT OF SERVICE OF STATEMENT BY APPELLEES OF GROUNDS IN OPPOSITION TO APPELLATE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES PURSUANT TO SUPREME COURT RULE 12, AND MOTION TO DISMISS APPEAL—(Omitted in printing)

[fol. 104] The United States of America, Eastern District of Tennessee, Northern Division, ss.

Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 105-106] IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1951

No. 120

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed June 22, 1951

1. Appellants adopt for their statement of points upon which they intend to rely in their appeal to this Court the points contained in the Assignment of Errors heretobefore filed.

2. Appellants designate the entire record, as filed in the above-entitled case, for printing by the Clerk of this Court.

Robert L. Carter, Counsel for Appellants.

[File endorsement omitted.]

[fol. 107] SUPREME COURT OF THE UNITED STATES

No. 120, October Term, 1951

[Title omitted]

ORDER—October 15, 1951

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court and of the motion to dismiss is postponed to the hearing of the case on the merits.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 120

GENE MITCHELL GRAY, LINCOLN ANDERSON BLAKENEY, JOSEPH HUTCH PATTERSON AND JACK ALEXANDER,
Appellants,

vs.

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF TENNESSEE, ETC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

STATEMENT AS TO JURISDICTION

CARL A. COWAN,
AVON N. WILLIAMS, JR.,
Z. ALEXANDER LOOBY,
THURGOOD MARSHALL,
ROBERT L. CARTER,
Counsel for Appellants.

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE,
NORTHERN DIVISION

Civil Action No. 1567

GENE MITCHELL GRAY, LINCOLN ANDERSON BLAKENEY, JOSEPH HUTCH PATTERSON AND JACK ALEXANDER,

Plaintiffs,

vs.

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF TENNESSEE, ETC., ET AL.

Defendants

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, plaintiffs-appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause.

Opinion Below

The opinion of the District Court of three judges for the Eastern District of Tennessee entered on April 13, 1951, has not yet been reported. A copy of the opinion and of

the order are attached hereto as Appendix "A." The opinion of the District Court of one judge for the Eastern District of Tennessee entered on April 20, 1951, has not yet been reported and is attached hereto as Appendix "B."

Jurisdiction

The judgment of the District Court of three judges was entered on April 13, 1951. The petition for appeal was presented to the District Court herewith to wit on May 7, 1951. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101 (b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Wilson* v. *Board of Supervisors*, — U. S. —, decided Jan. 2, 1951; *McLaurin* v. *Board of Regents*, 339 U. S. 637; *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290; *Eicholz* v. *The Public Service Commission of Missouri, et al.*, 306 U. S. 268; *Lemke* v. *Farmer Grain Co.*, 258 U. S. 50.

Questions Presented

I

Whether the constitutionality of an order of appellees, Board of Trustees of the University of Tennessee, and the Constitution and statutes of the state on which said order is based refusing to admit appellants to the University of Tennessee solely because of race and color may properly be raised in an action brought pursuant to Title 28, United States Code, Section 2281, where appellants seek to enjoin enforcement of the order, Constitution and statutes on the ground of their enforcement denying to them the equal protection of the laws secured by the Constitution of the United States?

II

Whether Title 28, United States Code, Section 2281, confers exclusive jurisdiction in a District Court of three judges to determine whether enforcement of an order refusing to grant appellants' admission to the University of Tennessee solely because of race or color, adopted pursuant to the Constitution and statutes of Tennessee, should be enjoined as violative of the Constitution of the United States and whether such court convened in accordance with Title 28, United States Code, Section 2284, can properly refuse jurisdiction?

III

Whether appellants' motion for judgment on the pleadings should have been granted?

Statutes Involved

Title 28, United States Code, Sections 1331, 1343, 2281 and 2284; Article 11, Section 12 of the Constitution of Tennessee, and Sections 11395, 11396 and 11397 as set forth in Appendix "C" hereto.

Order Involved

The appellees, Board of Trustees of the University of Tennessee, which exists pursuant to the Constitution and laws of the State of Tennessee as a state administrative agency or board (Constitution of Tennessee, Art. 11, Sec. 12; Acts of Tennessee, 1807, ch. 64 and 78, as amended by Pub. Acts of 1840, ch. 98, Secs. 4 and 5; Pub. Acts of 1879, ch. 75; Pub. Acts of 1909, ch. 48; Pub. Acts of 1939, ch. 30, Sec. 1; Code of Tennessee, Vol. 1, Title III, ch. 3, Art. 10; Acts of Tennessee, 1807, ch. 64, Sec. 3; Pub. Acts of 1840, ch. 186, Sec. 5; Code of Tennessee, Secs. 563, 566, 577, 584.8a and Pub. Acts of 1909, ch. 48, Sec. 1), on or about the

4th of December, 1950, took the following action with respect to appellants' application for admission to the University of Tennessee:

> "WHEREAS, the Constitution and the Statutes of the State of Tennessee expressly provide that there shall be segregation in the education of the races in schools and colleges in the State and that a violation of the laws of the State in this regard subjects the violator to prosecution, conviction and punishment as therein provided; and,
>
> "WHEREAS, this Board is bound by the Constitutional provision and the acts referred to;
>
> "BE IT THEREFORE RESOLVED, that the applications by members of the Negro race for admission as students into The University of Tennessee be and the same are hereby denied."

This order is set forth in Appendix "D" hereto.

Statement

Appellants are all Negroes, citizens of the United States and of the State of Tennessee. Appellants, Gene Mitchell Gray and Jack Alexander, applied for admission to the Graduate School of the University of Tennessee, such applications being for registration on the first day of the 1950 fall quarter and on the first day of the 1951 winter quarter, respectively. Appellants, Lincoln Anderson Blakeney and Joseph Hutch Patterson, applied for admission as first-year students in the College of Law of the University of Tennessee, such applications being for registration on the first day of the winter quarter, 1951. All appellants meet all the lawful requirements for admission to the school or college to which they applied and would have been admitted without question except for the fact that they are Negroes. The University of Tennessee is the only institution maintained by

the state where appellants may receive the educational opportunities and advantages they seek.

On December 4, 1950, appellees, the Board of Trustees of the University of Tennessee, met and denied appellants admission because of their race and color on the grounds that to so admit them would be in violation of the Constitution and laws of the State. This denial was embodied in a formal order adopted by appellees and set out *supra*.

Appellants thereupon brought an action in the United States District Court for the Eastern District of Tennessee pursuant to Title 28, United States Code, Sections 1331, 1343 and 2281 on their own behalf, and on behalf of all other Negroes similarly situated, seeking a preliminary and permanent injunction restraining appellees from enforcing said order and from making any distinction on the basis of race and color in the consideration of appellants' applications for admission as students to the University of Tennessee, and from enforcing Article 11, Section 12 of the Constitution of the State and Sections 11395, 11396 and 11397 of the Code of Tennessee on the grounds that the enforcement of said order, constitutional provisions or statutes would be an unconstitutional deprivation of appellants' rights.

Appellees, in their answer, admitted as a first defense that they had refused appellants' admission pursuant to Article 11, Section 12 of the Constitution of the State of Tennessee; and as a second defense that such refusal was required by Sections 11395, 11396 and 11397 of the Code of Tennessee which made it unlawful for Negroes and white persons to be taught together in the same school. Appellants' allegation that the University of Tennessee was the only state institution where appellants could secure the educational opportunities and advantages they seek was not controverted by appellees. Whereupon appellants filed a motion for judgment on the pleadings.

Pursuant to appellants' request, a special three-judge District Court was convened in accordance with Title 28, United States Code, Section 2884 and a hearing on said motion for judgment on the pleadings was held on March 13, 1951, before such court. In their complaint, and at the hearing, appellants urged the issuance of both a temporary and a permanent injunction enjoining enforcement of the order of December 4, 1950, and of Article 11, Section 12 of the Constitution and Sections 11395, 11396 and 11397 of the Code of Tennessee on the grounds that they were unconstitutional.

On April 13, 1951, the court below rendered an opinion disclaiming jurisdiction of this controversy for the reason that the right of the state to require segregation of the races in educational institutions had been consistently upheld by the United States Supreme Court. (See Opinion, Appendix A.) An order was issued dissolving the District Court of three judges on the grounds that the real issue raised was whether there had been a denial to appellants of the equal protection of the laws without regard to the constitutionality of the order, constitutional provisions or statutes heretofore referred to. The cause was ordered to proceed before a District Court of one judge. On April 20, 1951, the District Court of one judge, without further action by appellants, handed down an opinion in which appellees' refusal to admit appellants to the University of Tennessee was declared to be a denial of the equal protection of the laws. The Court said:

> "The Court finds that under the Gaines, Sipuel, Sweatt and McLaurin cases heretofore cited, these plaintiffs are being denied their right to the equal protection of the laws as provided by the Fourteenth Amendment and holds that under the decisions of the Supreme Court the plaintiffs are entitled to be admitted to the Schools of the University of Tennessee to which

they have applied for admission. Believing that the University authorities will either comply with the law as herein declared or take the case up on appeal, the Court does not deem an injunctive order presently to be appropriate. The case, however, will be retained on the docket for such orders as may seem proper when it appears that the applicable law has been finally declared."

It is appellants' contention that issuance of a declaratory judgment in which appellants are declared to be entitled to admission to the University does not accord to them the protection to which they are entitled. The Court, on April 20, 1951, specifically refused to grant to appellants injunctive relief prayed for in their complaint. It is appellants' contention that the issuance of an injunction by a single District Judge would have been a nullity in view of Title 28, United States Code, Section 2281, since such an injunction must necessarily be based on the unconstitutionality of the order of appellees denying appellants admission to the University of Tennessee; of Article 11, Section 12 of the Constitution of Tennessee and Sections 11395, 11396 and 11397 of the Code of Tennessee upon which the December 4, 1950, order was based and would require action by a District Court of three judges.

We bring the cause here in order to seek a reversal of the order issued on April 13, 1951, dissolving the three-judge court and disclaimer of jurisdiction, and a judgment from this Court granting appellants' motion for judgment on the pleadings.

The Questions Are Substantial

The issues involved in this appeal are similar to those raised by *Wilson* v. *Board of Supervisors, supra,* and *McLaurin* v. *Board of Regents, supra.* These issues are of great importance and involve the protection and the rights of appellants and the class they represent to the equal

protection of the laws with respect to the equality of opportunity to secure the educational advantages and facilities offered by the University of Tennessee. Appellants have been excluded from the University in reliance upon the segregation statutes and criminal sanctions of the Code of Tennessee. These statutes, as applied, are unconstitutional in that there is no other institution in which appellants may secure equal educational advantages. *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337; *Sipuel* v. *Board of Regents*, 332 U. S. 631; *Sweatt* v. *Painter*, 339 U. S. 629; *McLaurin* v. *Board of Regents*, *supra*. Their rights are substantial and appellants are entitled to speedy redress in the form of a permanent injunction restraining appellees from refusing to admit them to the University of Tennessee solely because of race and color. This remedy is only available through a District Court of three judges and the court below was in error in holding that it was without jurisdiction to decide this cause. This Court, in previous cases, has held in an action of this character that Title 28, United States Code, Section 2281, may properly be invoked. *Wilson* v. *Board of Supervisors*, *supra*; *McLaurin* v. *Board of Regents*, *supra*. The refusal of the court below to decide this cause and its referral of the question to a court of one judge, therefore, is directly contrary to decisions of this Court.

The question as to whether appellants are entitled to a judgment on the pleadings and for an order requiring their admission to the University of Tennessee in view of the fact that there is no other school maintained by the state to which appellants may attend has been conclusively settled in appellants' favor by decisions of this Court. *Missouri ex rel. Gaines* v. *Canada*, *supra*; *Sipuel* v. *Board of Regents*, *supra*; *Sweatt* v. *Painter*, *supra*; *Wilson* v. *Board of Supervisors*, *supra*. Therefore, the refusal of the court below to give appellants affirmative relief by granting their motion

for judgment on the pleadings and through issuance of an injunction ordering their admission is in direct conflict with decisions of this Court and hence presents a question of substantial nature for this Court's decision.

Their attempt to transfer the cause before a District Court of one judge should be declared a nullity since this is a cause in which the action of a District Court of three judges is required. *McLaurin* v. *Board of Regents, supra; Wilson* v. *Board of Supervisors; Oklahoma Natural Gas Company* v. *Russell*, 261 U. S. 290; *Stratton* v. *St. Louis S. W. R. Co.*, 282 U. S. 10; *In Re Buder*, 271 U. S. 461; *Lemke* v. *Farmers Grain Co., supra.*

WHEREFORE, it is submitted that this appeal should be granted, and that the order of April, 1951, should be reversed and the cause remanded with specific instructions to the court to issue an injunction ordering appellants' admission to the University of Tennessee.

Respectfully submitted,

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Knoxville, Tennessee;
AVON N. WILLIAMS, JR.,
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New York 18, N. Y.;
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New York 18, N. Y.,
Counsel for Plaintiffs-Appellants.

Dated: May 7, 1951.

APPENDIX "A"

UNITED STATES DISTRICT COURT, FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION

Civil Action No. 1567

GENE MITCHELL GRAY, LINCOLN ANDERSON BLAKENEY, JOSEPH HUTCH PATTERSON AND JACK ALEXANDER, Plaintiffs,

v.

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF TENNESSEE, ETC., ET AL., Defendants

Before MILLER, Circuit Judge, DARR and TAYLOR, District Judges.

MILLER, Circuit Judge. The plaintiffs by this action seek to enjoin the Board of Trustees of the University of Tennessee, the University of Tennessee, and certain of its officers from denying them admission to the Graduate School and to the College of Law of the University because they are members of the Negro race.

In brief, the complaint alleges that the plaintiffs are citizens of the United States and of the State of Tennessee, are residents of and domiciled in the City of Knoxville, State of Tennessee, and are members of the Negro race; that plaintiffs, Gene Mitchell Gray and Jack Alexander, are fully qualified for admission as graduate students to the Graduate School of the University; that plaintiffs Lincoln Anderson Blakeney and Joseph Hutch Patterson are fully qualified for admission as undergraduate students in law to the College of Law of the University; that the four plaintiffs are ready, willing and able to pay all lawful charges and fees, and to comply with all lawful rules and regulations, requisite to their admission; that the University of Tennessee is a corporation duly organized and existing under the laws of Tennessee, was established and is operated as a State function by the State of Tennessee, with two of its integral parts or departments being the Graduate

School and the College of Law; that it operates as an essential part of the public school system of the State of Tennessee, maintained by appropriations from the public funds of said State raised by taxation upon the citizens and taxpayers of the State including the plaintiffs; that there is no other institution maintained or operated by the State at which plaintiffs might obtain the graduate or legal education for which they have applied to the University of Tennessee; that the plaintiffs Gene Mitchell Gray and Jack Alexander applied for admission as graduate students to the Graduate School of the University and that the plaintiffs Lincoln Anderson Blakeney and Joseph Hatch Patterson applied for admission as undergraduate students in law to the College of Law of the University; and that on or about December 4, 1950, the Board of Trustees of the University refused and denied each and all of their applications for admission because of their race or color, relying upon the Constitution and Statutes of the State of Tennessee providing that there shall be segregation in the education of the races in the schools and colleges in the State. Plaintiffs contend that the action of the defendants in denying them admission to the University denies the plaintiffs, and other Negroes similarly situated, because of their race or color, their privileges and immunities as citizens of the United States, their liberty and property without due process of law, and the equal protection of the laws, secured by the 14th Amendment of the Constitution of the United States and by Section 41, Title 8, United States Code.

The defendants, by answer, state that they are acting under and pursuant to the Constitution and the Statutes of the State of Tennessee, by which they are enjoined from permitting any white and negro children to be received as scholars together in the same school; that provision has been made by Tennessee Statutes to provide professional education for colored persons not offered to them in state colleges for Negroes but offered for white students in the University of Tennessee; that the State of Tennessee, under its Constitution and Statutes and under its police power, has adopted reasonable regulations for the operation of its

institutions based upon established usages, customs and traditions, and such regulations being reasonable are not subject to challenge by the plaintiffs; and that the 14th Amendment of the Constitution of the United States did not authorize the Federal Government to take away from the State the right to adopt all reasonable laws and regulations for the preservation of the public peace and good order under the inherent police power of the State.

The plaintiffs requested a hearing by a three-judge court under the provisions of Title 28 U. S. Code, Section 2281, and moved for judgment on the pleadings in that the pleadings showed that there was no dispute as to any material fact and they were entitled to judgment as a matter of law. The present three-judge court was designated and in due course the case was argued before it.

We are of the opinion that the case is not one for decision by a three-judge court. Title 28 U. S. Code, Section 2281, requires the action of a three-judge court only when an injunction is issued restraining the action of any officer of the State upon the ground of the unconstitutionality of such statute. We are of the opinion that the case presents a question of alleged discrimination on the part of the defendants against the plaintiffs under the equal protection clause of the 14th Amendment, rather than the unconstitutionality of the statutory law of Tennessee requiring segregation in education. As such, it is one for decision by the District Judge instead of by a three-judge court.

The plaintiffs rely chiefly upon the decisions of the Supreme Court in *Missouri v. Canada*, 305 U. S. 337, *Sipuel v. Board of Regents*, 332 U. S. 631, *Sweatt v. Painter*, 339 U. S. 629 and *McLaurin v. Oklahoma State Regents*, 339 U. S. 637, in which State Universities were required to admit qualified negro applicants. In each of those cases the plaintiff was granted the right to be admitted to the State University on equal terms with white students because of the failure of the State to furnish to the negro applicant educational facilities equal to those furnished white students at the State University. The rulings therein are based upon illegal discrimination under the equal protection clause of the 14th Amendment, not upon the unconstitu-

tionality of a State statute. In *Sweatt* v. *Painter*, supra, the Court expressly pointed out (339 U. S. at page 631) that it was eliminating from the case the question of constitutionality of the State statute which restricted admission to the University to white students. Those cases did not change the rule, previously laid down by the Supreme Court, that State legislation requiring segregation was not unconstitutional because of the feature of segregation, *Plessy* v. *Ferguson*, 163 U. S. 537; *McCabe* v. *Atchison T. & S. F. Ry. Co.*, 235 U. S. 151, provided equal facilities were furnished to the segregated races. In *Sweatt* v. *Painter*, supra, the Supreme Court declined (339 U. S. at page 636) to re-examine its ruling in *Plessy* v. *Ferguson*, supra. In *Berea College* v. *United States*, 211 U. S. 45, and *Gong Lum* v. *Rice*, 275 U. S. 78, state segregation statutes dealing specifically with education were held to be unconstitutional. The validity of such legislation was recognized in *Missouri* v. *Canada*, supra, wherein the Court stated (305 U. S. at page 344)—"The State has sought to fulfill that obligation by furnishing equal facilities in separate schools, a method the validity of which has been sustained by our decisions." In that case, as well as in *Sweatt* v. *Painter*, supra, there were State statutes which required segregation for the purpose of higher education, but the decisions in those cases did not declare those statutes unconstitutional.

By Chapter 43 of the Public Acts of 1941, the State of Tennessee authorized and directed the State Board of Education and the Commissioner of Education to provide educational training and instruction for negro citizens of Tennessee equivalent to that provided at the University of Tennessee by the State of Tennessee for white citizens of Tennessee, such training and instruction to be made available in a manner to be prescribed by the State Board of Education and the Commissioner of Education, provided, that the members of the negro race and white race should not attend the same institution or place of learning. The Supreme Court of Tennessee has held that Act to be mandatory in character. *State ex rel. Michael v. Witham*, 179 Tenn. (15 Beeler) 250. Such legislation, specifically requiring equal educational training and instruction for white and negro

citizens, appears to go further than did some of the State Statutes involved in the Supreme Court cases above referred to, which were not declared unconstitutional in those cases. In our opinion, this case does not turn upon the unconstitutionality of the state statutes, but presents the same issue as was presented to the Supreme Court in *Missouri v. Canada*, supra, *Sipuel v. Board of Regents*, supra, *Sweatt v. Painter*, supra, and *McLaurin v. Oklahoma State Regents*, supra, namely, the question of discrimination under the equal protection clause of the 14th Amendment. Accordingly, this case, at least in its present stage, is one for decision by the District Judge, in the district of its filing, on the issue of alleged discrimination against the plaintiffs under the equal protection clause of the 14th Amendment. Such an issue does not address itself to a three-judge court. *Ex parte Bransford*, 310 U. S. 354; *Ex parte Collins*, 277 U. S. 565; *Rescue Army v. Municipal Court*, 331 U. S. 549, 568-574.

The two Judges designated by the Chief Judge of the Circuit to sit with the District Judge in the hearing and decision of this case do now accordingly withdraw from the case, which will proceed in the District Court where it was originally filed. See Lee v. Roseberry, 94 Fed. Supp. 324, 328.

UNITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF TENNESSEE, NORTHERN DIVISION

1567

GENE MITCHELL GRAY, LINCOLN ANDERSON BLAKENEY, JOSEPH HUTCH PATTERSON and JACK ALEXANDER, *Plaintiffs*,

v.

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF TENNESSEE, ETC., et al., *Defendants*.

ORDER

Before Miller, Circuit Judge; Darr and Taylor, District Judges

This case was heard on the record, briefs and argument of counsel for respective parties.

And the Court being of the opinion that the issue involved is alleged unjust discrimination against the plaintiffs under the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States, and not the constitutionality of certain statutes of the State of Tennessee, referred to in the pleadings;

And such issue not being one for decision by a three-judge court under the provisions of Section 2281, Title 28, U. S. Code;

It is ordered that the two Judges designated by the Chief Judge of the Circuit to sit with the District Judge, in whose District the action was filed, do now withdraw from the case and that the case proceed before said District Judge in the District of its filing.

(S.) SHACKELFORD MILLER, JR.,
Circuit Judge;

(S.) LESLIE R. DARR,
District Judge;

(S.) ROBT. L. TAYLOR,
District Judge.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION

Civil No. 1567

GENE MITCHELL GRAY et al.

vs.

UNIVERSITY OF TENNESSEE et al.

This case was heard by a three-judge court on the record, briefs and argument of counsel for the respective parties on plaintiffs' motion for summary judgment in their favor under Rule 56 of the Federal Rules of Civil Procedure.

In an opinion by Circuit Judge Miller, in which Chief District Judge Darr and District Judge Taylor of the Eastern District of Tennessee, concurred, the Court held that the issue involved is alleged unjust discrimination against the plaintiffs under the equal protection clause of the Fourteenth Amendment of the Constitution of the United States and not the constitutionality of the Tennessee statutes and constitutional provisions referred to in the complaint. Following this opinion and the order entered pursuant thereto, Judge Miller and Judge Darr withdrew from the case, which is now before this Court for decision on the motion.

Plaintiffs Gray and Alexander have applied for admission to the Graduate School and plaintiffs Blakeney and Patterson have applied for admission to the College of Law, of the University of Tennessee. All admittedly are qualified for admission, except for the fact that they are negroes.

The matter of their applications was referred by University authorities to the Board of Trustees, who disposed of the matter by the following resolution:

> "Whereas, the Constitution and the statutes of the State of Tennessee expressly provide that there shall be segregation in the education of the races in schools

and colleges in the State and that a violation of the laws of the State in this regard subjects the violator to prosecution, conviction, and punishment as therein provided; and,

"Whereas, this Board is bound by the Constitutional provision and acts referred to;

"Be it therefore resolved, that the applications by members of the Negro race for admission as students into The University of Tennessee be and the same are hereby denied."

Following the indicated action by the Board of Trustees, plaintiffs filed their joint complaint for themselves and on behalf of all negro citizens similarly situated, praying for a temporary and, after hearing, a permanent order restraining the defendants from executing the exclusion order of the Board of Trustees against the plaintiffs, or other negroes similarly situated, and from all action pursuant to the constitution and statutes of the State of Tennessee, and the custom or usage of the defendants, respecting the requirement of segregation of whites and negroes in state-supported educational institutions and exclusion of negroes from the University of Tennessee, their references being to Article 11, sec. 12, of the state constitution, to sections 2403.1, 2403.3, 11395, 11396, and 11397 of the Tennessee Code, and the custom and usage of defendants of excluding negroes from all colleges, schools, departments, and divisions of the University of Tennessee, including the Graduate School and the College of Law.

Defenses interposed are nine in number, but in substance they are these: That defendants, in rejecting the applications of the plaintiffs, were and are obeying the mandates of the segregation provisions of the constitution and laws of the State of Tennessee; that those provisions are in exercise of the police powers reserved to the states and are valid, the Fourteenth Amendment and laws enacted thereunder to the contrary notwithstanding, and that these plaintiffs have no standing to bring this action for the reason that they have not exhausted their administrative remedies under the equivalent facilities act of 1941, Code section

2403.3. The plaintiffs, after alleging in their complaint that the University of Tennessee maintains a Graduate School and a College of Law which offer to white students the courses sought by plaintiffs, make the following specific allegation, which defendants, for failure to deny, admit: "There is no other institution maintained or operated by the State of Tennessee at which plaintiffs might obtain the graduate and/or legal education for which they respectively have applied to The University of Tennessee."

It is, of course, recognized that the Constitution of the United States is one of enumerated and delegated powers. To remove original doubt as to the character of federal powers, the states adopted the Tenth Amendment, which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Constitution contains no specific delegation of police powers, and those powers are accordingly reserved. But a glance discloses that, in relation to the Tenth Amendment, the Constitution contains two groups of powers, namely, the previously-delegated powers and the subsequently-delegated powers. By adoption of the Fourteenth Amendment, following adoption of the Tenth Amendment, the states consented to limitations upon their reserved powers, particularly in the following respects: " . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . ."

It is recognized that "the police power of a state extends beyond health, morals and safety, and comprehends the duty, *within constitutional limitations,* to protect the well-being and tranquility of a community." Kovacs v. Cooper, 336 U. S. 77, 83. (Italics supplied). States "have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, *so long as their laws do not run afoul of some specific constitutional prohibition, or of some valid federal law.*" Whitaker v. North Carolina, 335, U. S. 525, 536. (Italics supplied).

In the foregoing quotations, the italicized portions point up the limitations upon the exercise of a state's police powers.

Segregation by law may, in a given situation, be a valid exercise of the state's police powers. It has been so recognized with respect to schools. Gong Lum et al v. Rice et al, 275 U. S. 78. Also, as to segregation on intrastate trains. Plessy v. Ferguson, 163 U. S. 537. But where enforcement by the state of a law ran afoul of the Fourteenth Amendment by denying members of a particular race or nationality equal rights as to property or the equal protection of the laws, the state action has been condemned. This was the result where state law discriminated against aliens as to the privilege of employment. Truax v. Raich, 239 U. S. 33. The same result was reached as to enforcement of restrictive covenants in deeds, Shelley et ux v. Kraemer et ux, 334 U. S. 1; in the housing segregation cases, Richmond v. Deans, 4 Cir., 37 F. 2d 712, affirmed 281 U. S. 704; Buchanan v. Warley, 245 U. S. 60; and in the cases where segregation has resulted in inequality of educational opportunities for negroes, Sweatt v. Painter et al, 339 U. S. 629; McLaurin v. Oklahoma State Regents, 339 U. S. 637. From these cases it appears to be well settled that exercise of the state's police powers ceases to be valid when it violates the prohibitions of the Fourteenth Amendment. The defense on this ground, therefore, fails.

The second question is whether the plaintiffs have present standing to bring this action. To understand the defense interposed here, it is desirable to look at the historical background of the act of 1941, of which the Court takes judicial notice.

On October 18, 1939, six negroes applied for admission to the University of Tennessee, four to the Graduate Department and two to the College of Law. Being denied admission, they filed their separate petitions for mandamus in the Chancery Court of Knox County, Tennessee, to require their admission. Following denial of the petitions in a consolidated proceeding, an appeal was taken to the Supreme Court of Tennessee, where the action of the Chancellor was affirmed by opinion filed November 7, 1942. State

ex rel. Michael et al. v. Witham et al., 179 Tenn. 250. The case was not disposed of by the Chancellor on its merits, but on the ground that it had become moot. While the case was pending in the Chancery Court, the state legislature enacted the act of 1941, now carried in the Code as sec. 2403.3, and entitled, *Educational facilities for negro citizens equivalent to those provided for white citizens:*

> "The state board of education and the commissioner of education are hereby authorized and directed to provide educational training and instruction for negro citizens of Tennessee equivalent to that provided at the University of Tennessee by the State of Tennessee for white citizens of Tennessee. Such training and instruction shall be made available in a manner to be prescribed by the state board of education and the commissioner of education; provided, that members of the negro race and white race shall not attend the same institution or place of learning. The facilities of the Agricultural and Industrial State College, and other institutions located in Tennessee, may be used when deemed advisable by the state board of education and the commissioner of education, insofar as the facilities of same are adequate."

Following enactment of the statute a supplemental answer was filed in the case then pending, in which it was averred that pursuant to the Act certain committees had been appointed by the state board of education, with instructions to report at the board's next regular meeting, an averment which suggested that the act of 1941 was to be made operative expeditiously.

The Supreme Court of Tennessee, in affirming the Chancellor's dismissal of the consolidated case, construed the act of 1941 to be mandatory in character. "No discretion whatever is vested in the State Board of Education under the Act as to the performance of its mandates. The manner of providing educational training and instruction for negro citizens equivalent to that provided for white citizens at the University of Tennessee is for the Board of Education to determine in its sound discretion, but the furnishing of such

equivalent instruction is mandatory." State ex rel. Michael et al. v. Witham et al., 179 Tenn. 250, 257.

The court also said at page 257: "Upon the demand of a negro upon the State Board of Education for training and instruction in any branch of learning taught in the University of Tennessee, it is the duty of the Board to provide such negro with equal facilities of instruction in such subjects as that enjoyed by the students of the University of Tennessee. The State Board of Education is entitled to reasonable advance notice of the intention of a negro student to require such facilities . . . No such advance notice by appellants is shown in the record."

At page 258, the court further said: "It does not appear that the State Board of Education is seeking in any way to evade the performance of the duties placed upon it by Chapter 43, Public Acts 1941, or that it is lacking sufficient funds to carry out the purposes of the Act. The state having provided a full, adequate and complete method by which negroes may obtain educational training and instruction equivalent to that provided at the University of Tennessee, a decision of the issues made in the consolidated causes becomes unnecessary and improper. The legislation of 1941 took no rights away from appellants; on the contrary the right to equality in education with white students was specifically recognized and the method by which those rights would be satisfied was set forth in the legislation. What more could be demanded?"

By failure to deny the allegations of the complaint, defendants admit that the directive, though mandatory, has not been carried out. Nevertheless, it is urged by defendants that these plaintiffs have no standing here until they have petitioned the state board of education to furnish the equivalent educational training and instruction for negroes provided for by the act. The Supreme Court of the state noted in its opinion that the then applicants for admission to the University of Tennessee had given to the state board "no such advance notice" of a desire to be furnished facilities under the act. That omission is understandable here for the reason that their applications for admission to the University of Tennessee had not been finally disposed of by

the courts, and the need of their applying to the state board had not been established.

Since the enactment of the Act of 1941 and the decision in State ex rel. Michael et al. v. Witham et al., 179 Tenn. 250, the Supreme Court of the United States has emphasized the pronouncement of one of its older cases as to a particular element of equal protection. In Missouri ex rel. Gaines v. Canada, 305 U.S. 337, it appeared that Lincoln University, a state-supported school for negroes, intended to establish a law school. As to this intention the court said: ". . . it cannot be said that a mere declaration of purpose, still unfulfilled, is enough." Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 346. In the same case, at page 351, the court said: "Here, petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, . . ." Later declarations indicate that the two quotations should be read together and that when so read they state the requirement of equality of opportunity to be personal and immediate.

In Fisher v. Hurst, 333 U.S. 147; the court emphasized its position that equality of opportunity in education means present equality, not the promise of future equality. This re-emphasized the necessity of equality as to time of an earlier decision, where the court said: "The State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group." Sipuel v. Board of Regents of the University of Oklahoma et al., 332 U.S. 631. In the holding in McLaurin v. Oklahoma State Regents, 339 U.S. 637, 642, the court said: "We conclude that the conditions under which this appellant is required to receive his education deprive him of his personal and present right to the equal protection of the laws." That equality of educational opportunity for negroes means present equality was emphasized once more in Sweatt v. Painter et al., 339 U.S. 629, 635: "This Court has stated unanimously that 'The State must provide (legal education)

for (petitioner) in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group'. Sipuel v. Board of Regents, 332 U.S. 631, 633." In view of these recent declarations of the Supreme Court of the United States, this Court is forced to conclude that the defense of exhaustion of administrative remedies fails.

The Court finds that under the Gaines, Sipuel, Sweatt and McLaurin cases heretofore cited, these plaintiffs are being denied their right to the equal protection of the laws as provided by the Fourteenth Amendment and holds that under the decisions of the Supreme Court the plaintiffs are entitled to be admitted to the schools of the University of Tennessee to which they have applied for admission. Believing that the University authorities will either comply with the law as herein declared or take the case up on appeal, the Court does not deem an injunctive order presently to be appropriate. The case, however, will be retained on the docket for such orders as may seem proper when it appears that the applicable law has been finally declared.

(S.) Robt. L. Taylor,
United States District Judge.

APPENDIX "C"

CONSTITUTION OF THE STATE OF TENNESSEE

Article 11, Section 12:

". . . And the fund called the common school fund, and all the lands and proceeds thereof . . . heretofore by law appropriated by the General Assembly of this State for the use of common schools, and all such as shall hereafter be appropriated, shall remain a perpetual fund, . . . and the interest thereof shall be inviolably appropriated to the support and encouragement of common schools throughout the State, and for the equal benefit of all the people thereof . . .

No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school . . . ''

CODE OF THE STATE OF TENNESSEE

Section 11395:

". . . It shall be unlawful for any school, academy, college, or other place of learning to allow white and colored persons to attend the same school, academy, college, or other place of learning.''

Section 11396:

". . . It shall be unlawful for any teacher, professor, or educator in any college, academy, or school of learning, to allow the white and colored races to attend the same school, or for any teacher or educator or other person to instruct or teach both the white and colored races in the same class, school, or college building, or in any other place or places of learning, or allow or permit the same to be done with their knowledge, consent or procurement.''

Section 11397:

". . . Any person violating any of the provisions of this article, shall be guilty of a misdemeanor, and, upon conviction, shall be fined for each offense fifty dollars, and imprisonment not less than thirty days nor more than six months.''

TITLE 28, UNITED STATES CODE

Section 1331. Federal question; amount in controversy

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

Section 1343. Civil rights

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

Section 2281. Injunction against enforcement of State Statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three-judges under section 2284 of this title.

Section 2284. Three-judge district court; composition; procedure

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

APPENDIX "D"

DECEMBER 4, 1950 ORDER OF THE BOARD OF TRUSTEES, UNIVERSITY OF TENNESSEE

WHEREAS, the Constitution and the Statutes of the State of Tennessee expressly provide that there shall be segregation in the education of the races in schools and colleges in the State and that a violation of the laws of the State in this regard subjects the violator to prosecution, conviction, and punishment as therein provided; and,

WHEREAS, this Board is bound by the Constitutional provision and acts referred to;

BE IT THEREFORE RESOLVED, that the applications by members of the Negro race for admission as students into The University of Tennessee be and the same are hereby denied.

CERTIFICATE

"We, Carl A. Cowan and Avon N. Williams, Jr., Attorneys for the plaintiffs-appellants, Gene Mitchell Gray, Lincoln Anderson Blakeney, Joseph Hutch Patterson and Jack Alexander, do hereby certify that the foregoing Order is a true, full, correct and complete copy of the Resolution or Order adopted by the Board of Trustees of The University of Tennessee at their meeting on Monday, December 4, 1950, as enclosed in a letter dated December 7, 1950 mailed to us from Cloide Everett Brehm, President of The University of Tennessee, and as more particularly set forth in Exhibits 'C' and 'D' of plaintiffs' complaint."

This 7th day of May, 1951.

(S.) CARL A. COWAN,
101½ W. Vine Avenue,
Knoxville, Tennessee;

(S.) AVON N. WILLIAMS, JR.,
511 E. Vine Avenue,
Knoxville 15, Tennessee,
Attorneys for Plaintiffs-Appellants.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 120

GENE MITCHELL GRAY, LINCOLN ANDERSON BLAKENEY, JOSEPH HUTCH PATTERSON and JACK ALEXANDER,

Appellants,

vs.

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF TENNESSEE, ETC., *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

BRIEF FOR APPELLANTS

ROBERT L. CARTER,
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JUDICIAL PRINTING CO., INC., 82 Beekman St., N. Y.—BEekman 3-9084-5-6 182

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Appellants,

vs.

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF TENNESSEE, ETC., *et al.*,

Appellees.

BRIEF FOR APPELLANTS

Opinions Below

After notice and hearing, the statutory three-judge District Court for the Eastern District of Tennessee disclaimed jurisdiction as a statutory three-judge court and remanded the cause for proceedings before a single judge. An opinion setting forth the reasons for this action was filed on April 13, 1951, and appears at pages 35-40 of the record. It is not officially reported.

Without further hearing or notice to the parties, District Judge ROBERT L. TAYLOR, in whose district the complaint had been filed, on April 20, 1951, filed an opinion in which he found that appellants had been denied the equal protection of the laws but refused to grant affirmative relief. The cause was retained "for such orders as may

be proper when it appears that the appropriate law has been finally declared." That opinion is reported in 97 F. Supp. 463 and may be found at pages 40-47 of this record.

Jurisdiction

Jurisdiction of this Court is invoked under Title 28, United States Code, Sections 1253 and 2101(b), this being a direct appeal from an order which, in effect at least, denied, after notice and hearing, appellants' application for a preliminary and permanent injunction to restrain the enforcement by appellees of constitutional and statutory provisions of the State of Tennessee, and a December 4, 1950 order of the Board of Trustees of the University of Tennessee, on the grounds that these aforesaid provisions and order deny to appellants the equal protection of the laws as secured by the Fourteenth Amendment to the Constitution of the United States.

Appellants in their complaint contested the constitutionality of these provisions and order, and injunctive relief was specifically sought (R. 1-20). In their answer, appellees defended their refusal to admit appellants to the University of Tennessee on the grounds that they had no other recourse under the constitution and statutes of the state (R. 25-27). Thus, the constitutionality of the order of an administrative agency and of laws of the State of Tennessee was squarely in issue.

Statement of the Case

Appellants, having met all lawful requirements, made due and proper application for admission to the graduate and law schools of the University of Tennessee. Gene Mitchell Gray sought permission to enroll in the graduate school commencing in the fall quarter of 1950, and Jack

Alexander desired approval of his application for enrollment in the graduate school beginning in the winter quarter of 1951. Both Lincoln Anderson Blakeney and Joseph Hutch Patterson desired to enroll in the first-year class of the law school in the winter quarter of 1951 (R. 9).

The University of Tennessee is the only state institution offering the courses appellants desire to pursue, and they would have been admitted except for the fact that they are Negroes (R. 6). On December 4, 1950, appellees, the Board of Trustees of the University of Tennessee, met and denied appellants' application solely because of their color (R. 14). Its action was embodied in the following formal order:

> "Whereas, the Constitution and the Statutes of the State of Tennessee expressly provide that there shall be segregation in the education of the races in schools and colleges in the State and that a violation of the laws of the State in this regard subjects the violator to prosecution, conviction, and punishment as therein provided; and,
>
> "Whereas, this Board is bound by the Constitutional provision and acts referred to;
>
> "Be it therefore resolved, that the applications by members of the Negro race for admission as students into The University of Tennessee be and the same are hereby denied" (R. 14).

The applicable state constitution and statutory provisions upon which the above order was based are:

> Article 11, Section 12 of Constitution of Tennessee.
>
> ". . . And the fund called the common school fund, and all the lands and proceeds thereof . . . heretofore by law appropriated by the General Assembly of this State for the use of common schools, and all such as shall hereafter be appropriated, shall remain a perpetual fund, . . . and the interest thereof shall be inviolably appropriated to the support and encouragement of common schools throughout the

State, and for the equal benefit of all the people thereof. . . No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school. . . ."

Section 11395 of the Code of Tennessee

". . . It shall be unlawful for any school, academy, college, or other place of learning to allow white and colored persons to attend the same school, academy, college, or other place of learning."

Section 11396 of the Code

". . . It shall be unlawful for any teacher, professor, or educator in any college, academy, or school of learning, to allow the white and colored races to attend the same school, or for any teacher or educator or other person to instruct or teach both the white and colored races in the same class, school, or college building, or in any other place or places of learning, or allow or permit the same to be done with their knowledge, consent or procurement."

and

Section 11397 of the Code

". . . Any person violating any of the provisions of this article, shall be guilty of misdemeanor, and, upon conviction, shall be fined for each offense fifty dollars, and imprisonment not less than thirty days nor more than six months."

Appellants thereupon filed on January 12, 1951, a complaint in the court below in the nature of a class suit, in which application was made for both a preliminary and a permanent injunction to restrain the enforcement of the December 4th order of the Board of Trustees, Article 11, Section 12 of the Constitution and Sections 11395, 11396 and 11397 of the Code of Tennessee, on the grounds that the aforesaid order and provisions under attack deprived

appellants of rights secured under the Fourteenth Amendment to the Constitution of the United States (R. 1-20).

On February 1, 1951, appellees filed their answer in which no material allegations in appellants' complaint were controverted and in which the denial of appellants' admission to the University of Tennessee was defended on the grounds that such denial was required by the constitution and statutes of the state (R. 25-27).

On February 12, 1951, appellants filed a motion for judgment on the pleadings (R. 28). The court below, which had been convened pursuant to Title 28, United States Code, Sections 2281 and 2284 (R. 28-29), held a hearing in Knoxville, Tennessee, on March 13, 1951, and on April 13, 1951, handed down an opinion in which jurisdiction was disclaimed, the three-judge court was ordered dissolved and the cause ordered to proceed before District Judge ROBERT TAYLOR, in whose district the complaint had been filed (R. 35-40).

On April 20, 1951, Judge TAYLOR ruled that appellees' refusal to admit appellants to the University of Tennessee constituted a denial of the equal protection of the laws but refused to issue any affirmative order in enforcement of appellants' rights (R. 40-47). Appellants thereupon brought the cause here on direct appeal. This Court, on October 15, 1951, ordered a hearing on the merits, postponing further consideration of jurisdiction and the motion to dismiss pending such hearing (R. 53).

Errors Relied Upon

The court below erred:

1. In refusing to grant appellants' motion for judgment on the pleadings in that appellees' order, refusing appellants' admission to the University of Tennessee, solely because of their color, made pursuant to the constitution and statutes of Tennessee was an unconstitutional deprivation of appellants' rights.

2. In holding that the issues raised did not involve the constitutionality of the constitution and statutes of the State of Tennessee and of the order of the appellees as an administrative agency of the state, for the reason that in the order refusing appellants admission and in their answer to appellants' complaint, appellees seek to justify their refusal on the grounds that the constitution and statutes of Tennessee make mandatory their denial of appellants' applications.

3. In refusing to grant appellants' application for a temporary and permanent injunction as prayed for in their complaint.

4. In holding that this cause does not come within the jurisdiction of a district court of three judges as such jurisdiction is defined in Title 28, United States Code, Sections 2281 and 2284.

5. In ordering the dissoluton of the three-judge court and in remanding the cause to District Judge Robert Taylor sitting alone, since under Title 28, United States Code, Sections 2281 and 2284, a single District Judge is without power and authority to grant or deny the injunctive relief herein prayed for.

Summary of Argument

On December 4, 1950, appellees, the Board of Trustees of the University of Tennessee, issued a formal order denying appellants' admission to the graduate school and law school of the University of Tennessee, because of their race. This action was taken pursuant to Article 11, Section 12 of the Constitution and Sections 11395, 11396 and 11397 of the Code of Tennessee. These provisions make it unlawful for white and Negro persons to attend the same school or college, and violators are subject to criminal prosecution. Appellants contend that the order, the constitutional and statutory provisions conflict with the Fourteenth Amendment to the Constitution of the United States and are, therefore, invalid. Application for injunctive relief to restrain enforcement by appellees of this unconstitutional state policy was made in the lower court pursuant to Title 28, United States Code, Section 2281. Appellees rely upon Article 11, Section 12 of the Constitution and Sections 11395, 11396 and 11397 of the Code as a complete defense, and allege that they have no recourse other than to refuse to admit appellants to the University of Tennessee because of these state provisions.

Although actually upholding the constitutionality of Article 11, Section 12 of the Constitution and Sections 11395, 11396 and 11397 of the Code, the court below ruled, that appellants' right to contest this question in a proceeding of this nature had been foreclosed by decisions of this Court sustaining the constitutionality of state laws requiring racial segregation. In effect, the court found that appellants' claim that the state's policy was unconstitutional was not substantial. The only issue which appellants could raise, or had raised according to the court below, was one of "unjust discrimination . . . under the Equal Protection Clause . . . and not the constitutionality of certain statutes of the state of Tennessee" (R. 39-40). On

this basis, it was held that the jurisdictional requirements for a district court of three judges under Title 28, United States Code, Section 2281, had not been met; the three-judge court was ordered dissolved and the cause remanded for proceedings before Judge TAYLOR.

We are confident that the court was in error and that all the requisite requirements essential to the jurisdiction of a three judge federal court have been met. Appellants' claim of unconstitutionality is that they have been and are being denied educational opportunities and advantages by the state equal to those available to all other persons. That this allegation presents a substantial federal question can hardly be open to doubt at this stage of the development of our law.

While there is sharp disagreement between appellants and the court below with respect to interpretation of the substantive law determinative of appellants' rights, whatever view one takes, we submit, he is forced to conclude that the jurisdictional requirements for a three judge court have been met in this case.

We interpret the *Sweatt* and *McLaurin* cases to mean that a state cannot enforce distinctions based upon race with respect to graduate and professional education available in state institutions. While *Plessy* v. *Ferguson* was not overruled, whatever may be the impact of the *separate but equal* doctrine on the state's power to impose racial classifications and distinctions in general, in the area of state graduate and professional education, that doctrine is now totally without significance. The court below has taken this Court's discussion of *Plessy* v. *Ferguson* in the *Sweatt* case to mean that enforced racial segregation in state graduate and professional schools is still valid under the *separate but equal* doctrine. In view of this unreconcilable conflict in interpretation we hope the Court will use this occasion to clarify the question once and for all.

The real problems involved in this appeal are procedural—whether appellant may seek review of the action of the court below on direct appeal or by petition for writ of mandamus. Persuasive considerations tend to support either remedy. Our position is that this Court has jurisdiction on appeal, but if it does not, mandamus will lie.

Title 28, United States Code, Section 1253, grants a direct appeal to this Court from a grant or denial of a preliminary or permanent injunction by a three judge court. Had the court below dismissed appellants' complaint or expressly denied their application for injunctive relief, there would be no question concerning the jurisdiction of this Court on direct appeal. Here, however, the court's order did not directly do either of those things. It merely dissolved the three judge court and remanded the cause to Judge TAYLOR sitting alone for further proceedings. This being an appropriate case for a three judge federal court, a single federal judge is without power to grant appellants the relief for which they have applied. By dissolving the only court having jurisdiction of the case, the lower court made it impossible for appellants to secure injunctive relief. Appellants' application for a preliminary and permanent injunction has been denied, therefore, as effectively as if a judgment expressly denying the injunction or dismissing the complaint had been entered. For those reasons this Court has jurisdiction to review this case on direct appeal.

ARGUMENT

I

Appellants are entitled to admission to the University of Tennessee subject only to the same rules and regulations applicable to all other students.

The substantive rights which appellants are here seeking to enforce have been conclusively determined by prior decisions of this Court. A state cannot deny educational facilities to one racial group while offering it to others; and where such facilities are available in only one state institution, Negroes cannot be barred by the state from attending that institution pursuant to a policy of enforced racial separation. *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337. When educational facilities are offered to white persons, they must be offered to Negroes at the same time. *Sipuel* v. *Board of Regents*, 332 U. S. 631. A state cannot impose a policy of racial separation or make any other distinctions grounded in race or color with respect to professional and graduate education offered at state universities. In short, all persons meeting the requirements for admission are entitled to attend graduate and professional schools of state universities subject only to same rules and regulations applicable to all other persons. *Sweatt* v. *Painter*, 339 U. S. 629; *McLaurin* v. *Oklahoma*, 339 U. S. 637; *Board of Supervisors, La. State University* v. *Wilson*, 340 U. S. 909; rehearing den. 340 U. S. 939; *McKissick* v. *Carmichael*, 187 F. 2d 949 (4th Cir. 1951); cert. denied 341 U. S. 951. From the cases it is clear, therefore, that any state action, whether in the form of an order of an administrative agency, constitutional provision or statute which prohibits appellants' admission to the University of Tennessee is unconstitutional and void.

While this Court did not specifically strike down the segregation statutes and laws of Texas and Oklahoma under which those states sought to impose a policy of racial segregation with respect to their graduate and professional schools, the Court declared such policy void and unconstitutional. See *McLaurin* and *Sweatt* cases. The only possible effect of those decisions was that such laws were no longer operative.

It is true that the Court stated in *Sweatt* case at pages 635 636 that it could not "agree with respondents that the doctrine of *Plessy* v. *Ferguson*, 163 U. S. 537 . . . requires affirmation of the judgment below. Nor need we reach petitioner's contention that *Plessy* v. *Ferguson* should be reexamined in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation. See *supra*, page 631." At that page the Court said that *McLaurin* and *Sweatt* cases "present different aspects of this general question: To what extent does the Equal Protection Clause of the Fourteenth Amendment limit the power of a state to distinguish between students of different races in professional and graduate education in a state university? Broader issues have been urged for our consideration, but we adhere to the principle of deciding constitutional questions only in the context of the particular case before the Court." The Court found that the segregated law school in the *Sweatt* case and the special rules and regulations imposed because of race in the *McLaurin* case deprived both of equal educational opportunities as required by the Fourteenth Amendment. On reading the two cases it is clear that the Court means that the constitutional requirement that equal educational opportunities be afforded cannot be met in graduate and professional schools where the state seeks to enforce racial distinctions and seeks to treat persons differently because of race. Hence, the Fourteenth Amend-

ment denies to the state the power to make racial distinctions or classifications with respect to that phase of the state's educational process.

The statement quoted above with respect to *Plessy* v. *Ferguson*, which the court below interprets as "eliminating from the case the question of constitutionality of the State statute which restricted admission to the University to white students" (R. 38-39), was intended to emphasize that the Court's decisions specifically concerned graduate and professional education only. But see *Rice* v. *Arnold*, 340 U. S. 848. Whatever present weight the *separate but equal* doctrine may carry, it is clear that it can no longer be used to determine whether equality of educational opportunities in graduate and professional education is available. Here where state laws seek to deny appellants admission to graduate and professional schools of the state university, they are clearly unconstitutional. The court below believes them to still have vitality. We think the Court should take this opportunity to clarify this point.

II

This case is one in which a three-judge court has jurisdiction and in which review by this Court on direct appeal is warranted.

A preliminary and a permanent injunction to restrain the enforcement of appellees' order of December 4, 1950, refusing to admit appellants to the University of Tennessee pursuant to Article II, Section 12 of the Constitution of the State and Sections 11395, 11396, and 11397 of the Code of Tennessee is here being sought on the grounds that the order, constitutional provision and statutes deprive appellants of their rights to equal educational opportunities as secured under the Fourteenth Amendment

to the Constitution of the United States. Appellees are state officers, *Missouri ex rel. Gaines* v. *Canada; supra,* and the Board of Trustees of the University of Tennessee is an administrative board within the meaning of Title 28, United States Code, Sections 2281 and 2284. *McLaurin* v. *Board of Regents, supra; Board of Supervisors, La. State University* v. *Wilson, supra.* Appellants' claim of unconstitutionality presents a substantial federal question. *Sweatt* v. *Painter, supra; Sipuel* v. *Board of Regents, supra.*

The court below seeks to redefine the issues raised by describing them as allegations of unjust discrimination under the equal protection clause rather than of constitutionality of state segregation statutes. The court stated that state legislation requiring segregation was not unconstitutional because of the feature of segregation. *Plessy* v. *Ferguson, supra; McCabe* v. *Atcheson, T. & S. F. Ry. Co.,* 235 U. S. 151; *Berea College* v. *Kentucky,* 211 U. S. 45; and *Gong Lum* v. *Rice,* 275 U. S. 78 are cited in support of this contention. It is alleged that *Sweatt* v. *Painter* did not change this rule. What we take the court to mean is that in the light of these decisions appellants' claim that the state policy is unconstitutional has been foreclosed and that hence that claim does not present a substantial federal question.

We have already attempted to point out that the court was in error in its analysis of the *Sweatt case.* We cannot accept in toto either the court's analysis of the other cases and do not believe them to be applicable to this case. Even assuming *arguendo,* however, the correctness of the court's view, we fail to see how it affects appellants' right to have their applications for injunctive relief heard and determined by a three judge court. At the very least those cases stand for the proposition that enforced racial segregation is permissible as long as the facilities provided Negroes are equal to those available to other racial groups.

This is the condition which must be satisfied if segregation laws are to be held constitutional under the *separate but equal* doctrine. *Ergo,* where that condition has not been met, the segregation is unconstitutional. Certainly where the record shows that the University of Tennessee is the only state institution offering the courses appellants desire to pursue; that they have been denied admission thereto solely because of their race pursuant to state policy; and appellants seek to enjoin enforcement of that policy on the grounds that it conflicts with the federal constitution, a substantial claim of unconstitutionality has been made. See *Missouri ex rel Gaines* v. *Canada, supra.*

Thus all ingredients essential to the jurisdiction of a three judge federal court have been met. See *Stratton* v. *St. Louis S. W. Ry. Co.,* 282 U. S. 10; *Smith* v. *Wilson,* 273 U. S. 388; *Moore* v. *Fidelity & Deposit Co,* 272 U. S. 317; *International Garment Workers Union* v. *Donnelly Garment Co.,* 304 U. S. 243; *Ex parte Hobbs,* 280 U. S. 168; *Phillips* v. *United States,* 312 U. S. 246; *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.,* 292 U. S. 386; *Ex parte Poresky,* 290 U. S. 30; *In re Buder,* 271 U. S. 461; *Oklahoma Natural Gas Co.* v. *Russell,* 261 U. S. 290; *Query* v. *United States,* 316 U. S. 486; *American Federation of Labor* v. *Watson,* 327 U. S. 582.[1] Of course, equity jurisdiction may be withheld in the public interest in exercise of sound discretion, see *Spector Motor Service* v. *McLaughlin,* 323 U. S. 101; *Chicago* v. *Fieldcrest Dairies, Inc.,* 316 U. S. 168; *Burford* v. *Sun Oil Co.,* 319 U. S. 315; but the public interest in this case demands that the chancellor exercise his power. See *McLaurin* v. *Board of Regents, supra.*

Decisions of a properly convened three judge court may be reviewed by this Court on direct appeal, and if the case

[1] For discussion of three judge court requirements, see: Hutcheson, *A Case For Three Judges* (1934), 47 Harv. L. Rev. 795; Berueffy, *The Three Judge Federal Court* (1942), 15 Rocky Mt. L. Rev. 64; Bowen, *When Are Three Judges Required* (1931), 16 Minn. L. Rev. 1; and Notes in 28 Ill. L. Rev. 839 (1934); 32 Mich. L. Rev. 853 (1934); 38 Yale L. J. 955 (1929).

is not appropriate for decision by a three judge court, appeal to this Court does not lie. *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co., supra; Jameson & Co.* v. *Morgenthau*, 307 U. S. 171; *Public Service Commission of Missouri* v. *Brashear Freight Lines, Inc.*, 312 U. S. 784; *Gully* v. *Interstate Natural Gas Co.*, 292 U. S. 16; *International Garment Workers Union* v. *Donnelly Garment Co., supra. Pendergast* v. *United States*, 314 U. S. 574; *American Insurance Co.* v. *Lucas*, 314 U. S. 575. Yet notwithstanding lack of jurisdiction on appeal, this Court has issued orders for the purpose of carrying out the objectives of Section 2281 by virtue of authority to determine whether the lower court acted within its jurisdiction under that statute. See *Gully* v. *Interstate Natural Gas Co., supra.*

Had the court below expressly granted or denied the preliminary and permanent injunctions for which appellants prayed, appellants would clearly have been entitled to review by direct appeal, *McLaurin* v. *Board of Regents, supra; Board of Supervisors* v. *Wilson, supra;* or if the court had dismissed the complaint, direct appeal would have been the appropriate remedy, *Grubb* v. *Public Utilities Commission*, 281 U. S. 470; *Sprunt & Son* v. *United States*, 281 U. S. 249; and see Bowen, When Are Three Judges Required (1931), 16 Minn. L. Rev. 1. Here, however, the court below merely disclaimed jurisdiction and remanded the cause for proceedings before a single district judge. Unless this order constitutes a denial of injunctive relief and/or a dismissal of the complaint, it would not appear that direct appeal will lie.

In order to determine whether this order is appealable, it is essential to examine its effect in respect to appellants' cause of action. Appellants have met all the requirements essential to jurisdiction of a three judge court and for purposes of this suit a hearing and determination by a three judge court is mandatory. Under such circumstances a single judge cannot assume or be awarded jurisdiction,

Stratton v. *St. Louis S. W. Ry. Co., supra; Ex parte Collins*, 277 U. S. 565; *Ex parte Williams*, 277 U. S. 267. See also *Riis & Co.* v. *Hoch*, 99 F. 2d 553 (10th Cir. 1938); *Smith* v. *Dudley*, 89 F. 2d 453 (8th Cir. 1937). Even if appellants had not sought an injunction on grounds of unconstitutionality, in which case a three judge court would not have been necessary, *International Garment Workers Union* v. *Donnelly Garment Co., supra*, appellees seek to defend their conduct on grounds that it was mandatory under Tennessee law and that they would be acting illegally in admitting appellants. Thus, the issue of the conflict between the Tennessee law and the Board's order with the federal constitution would have to be decided, and the convening of a three judge court would have been rendered necessary without regard to appellants' complaint. At any rate, having properly elected to proceed under Section 2281, this is not a situation where it may be appropriate for a court to require appellants to seek a different mode of redress.[2]

By dissolving the only court which has jurisdiction to grant appellants the relief sought, the court below has effectively denied appellants injunctive relief. Such relief cannot be granted by a single judge. Had Judge TAYLOR attempted to issue an injunction restraining appellees from enforcing the state's policy, it could only have been issued on the grounds that this policy violated the constitution. If Judge TAYLOR had granted injunctive relief under those

[2] Usually this occurs when the issues involved concern constitutionality under the state constitution, and state courts have not spoken. Normally federal jurisdiction is withheld pending determination by the state courts of the state question. See *Railroad Commission of Texas* v. *Pullman*, 312 U. S. 496; *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478; *Chicago* v. *Fieldcrest Dairies Inc., supra; Spector Motor Service* v. *McLaughlin, supra; American Federation of Labor* v. *Watson, supra.* See also: Pogue, *State Determination of State Law and the Judicial Code* (1928), 41 Harv. L. Rev. 623; Frankfurter *Distribution of Judicial Power Between United States and State Courts* (1928), 13 Corn. L. Q. 499; Lockwood, Maw and Rosenberry, *The Use of the Federal Injunction in Constitutional Litigation* (1939), 43 How. L. Rev. 426. But here the sole and only question is whether the state policy conflicts with federal constitution and hence the doctrine of the *Pullman* case has no application.

circumstances, he would have exceeded his jurisdiction. *Ex parte Metropolitan Water Co.*, 220 U. S. 539; *Ex parte Williams, supra; Stratton* v. *St. Louis S. W. Ry., supra; Ex parte Northern Pacific Ry.*, 280 U. S. 142; *Ayrshire Collieries Corp.* v. *United States*, 331 U. S. 132. Actually, therefore, the court below has denied appellants injunctive relief and their order should be as subject to appeal as a decree expressly denying the injunctive relief sought. See *General Electric Co.* v. *Marvel Rare Metals Co.*, 287 U. S. 430.

Although Judge TAYLOR has declared appellants are entitled to admission to the University of Tennessee, and this decision was handed down last August, the state has made no move to accept appellants as students at the University. It is clear that only by a restraining order against enforcement of the state policy barring their admission because of race, on grounds that this is in conflict with the federal constitution, will appellants be admitted to the University of Tennessee. The substantive law on this subject is clear and conclusive, and appellants should not be further delayed in their educational pursuits through procedural delays. This case should be reviewed on the merits and, we submit, this Court has jurisdiction on appeal.

Conclusion

Direct appeal to this Court from decisions of three judge district courts provides a speedy method for review of important constitutional questions. Under the decisions of this Court, there can be no doubt that appellants are entitled to be admitted to the University of Tennessee. The injury to them, in terms of loss of time and of potential development, caused by appellees' illegal conduct is irremedial. Further procedural delays in vindicating their rights will merely compound the injury. Review of this case on the merits by this Court on direct appeal will serve

to hasten the final determination of appellants' rights to attend the University of Tennessee.

For these reasons, we submit, a direct appeal to this Court should be allowed, and the cause reversed and remanded with instructions to the court below to enjoin appellees from enforcing their order, the constitution and statutes of the state pursuant to which appellants have been denied admission to the University of Tennessee.

Respectfully submitted,

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Z. ALEXANDER LOOBY,
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951

No. 120

GENE MITCHELL GRAY, LINCOLN ANDERSON BLAKENEY, JOSEPH HUTCH PATTERSON, AND JACK ALEXANDER, *Appellants,*

vs.

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF TENNESSEE, ETC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

STATEMENT BY APPELLEES OF GROUNDS IN OPPOSITION TO APPELLATE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES PURSUANT TO SUPREME COURT RULE 12, AND MOTION TO DISMISS APPEAL.

The appellees state the following matters and grounds against the jurisdiction of the Supreme Court of the United States, as asserted by the appellants herein in their statement of the basis of the appellate jurisdiction, filed herein

on the 7th day of May, 1951, as required by Rule 12 of the Supreme Court;

I

This case was not a proper case for the consideration of a three-judge court. In support of this contention, the appellees cite the following cases: *Ex Parte Bransford*, 310 U. S. 354; *Ex Parte Collins*, 277 U. S. 565; *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568-574. Consequently, no direct appeal lies to the Supreme Court under Title 28, United States Code, Sections 1253 and 2101(b). (See also the opinion of the District Court of three Judges for the Eastern District of Tennessee in this cause, filed on April 13, 1951, which has not yet been reported but a copy of which is attached as Appendix A to the appellants' statement and petition for the allowance of an appeal to the Supreme Court filed herein.)

II

The opinion of the District Court of three Judges for the Eastern District of Tennessee, filed on April 13, 1951, in this cause and the order entered pursuant thereto shows that the question involved in this case is the alleged unjust discrimination against the plaintiffs under the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States, and not the constitutionality of certain statutes of the State of Tennessee, or the order of the Board of Trustees of the University of Tennessee, referred to in the pleadings.

III

The pleadings in this cause show that the real question presented is whether or not the plaintiffs exhausted their administrative remedies as provided by Chapter 43 of the Public Acts of Tennessee of 1941, and hence no constitu-

tional question was presented for determination by a three-judge court. Accordingly, no direct appeal lies to the Supreme Court.

IV

The right of the plaintiffs to appeal is not to the Supreme Court but to the Court of Appeals for the Sixth Circuit.

V

The record discloses that the defendants prayed no appeal from the opinion and judgment of the District Court for the Eastern District of Tennessee, Northern Division, filed on April 20, 1951. Consequently, the questions sought to be presented by the plaintiffs in their application to appeal to the Supreme Court are now moot for the reason that said opinion and judgment of the District Court will become final prior to the filing of this record with the Supreme Court of the United States, entitling plaintiffs to the relief provided by said opinion and order of the District Court.

WHEREFORE, the appellees move the Court to dismiss the appellants' petition for the allowance of an appeal to the Supreme Court.

Dated: May 17, 1951.

Respectfully submitted,

J. K. HARLAN DODSON, JR.,
JOHN J. HOOKER,
By (S.) JOHN J. HOOKER,
Attorneys for Appellees.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 159 Miscellaneous

EX PARTE GENE MITCHELL GRAY, LINCOLN ANDERSON BLAKENEY, JOSEPH HUTCH PATTERSON AND JACK ALEXANDER.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS, PETITION FOR A WRIT OF MANDAMUS, AND BRIEF IN SUPPORT OF MOTION AND PETITION FOR MANDAMUS

Z. ALEXANDER LOOBY,
ROBERT L. CARTER,
THURGOOD MARSHALL,
Counsel for Petitioners.

CARL A. COWAN,
AVON N. WILLIAMS, JR.,
Of Counsel.

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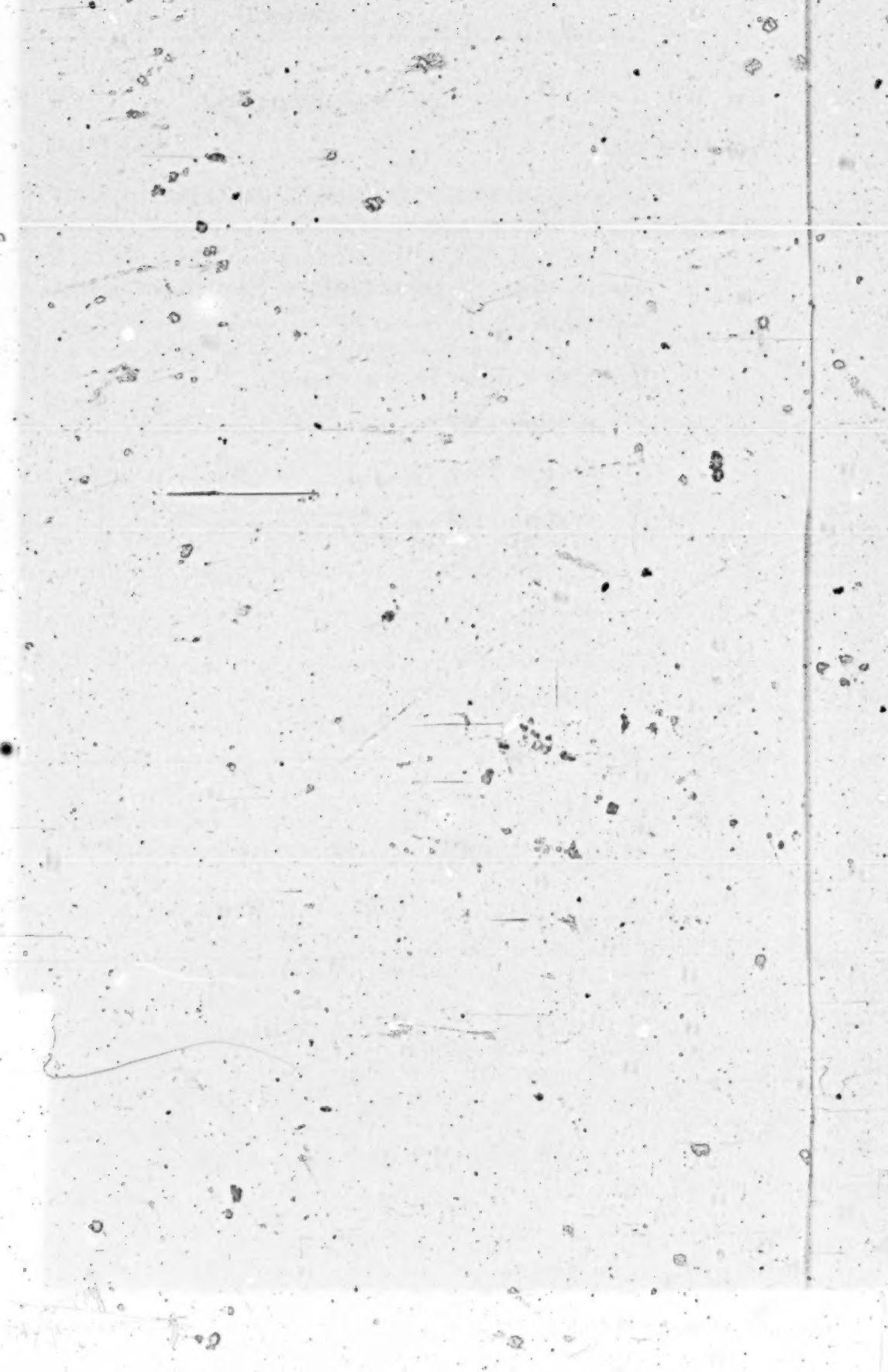

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. ..... Miscellaneous

EX PARTE GENE MITCHELL GRAY, LINCOLN ANDERSON BIXKENEY, JOSEPH HUTCH PATTERSON and JACK ALEXANDER.

MOTION FOR LEAVE TO FILE A PETITION FOR WRIT OF MANDAMUS

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners move the Court for leave to file the petition for writ of mandamus hereto annexed; and further move that an order and rule be entered and issued directing the Honorable, the United States District Court for the Eastern District of Tennessee, Northern Division, the Honorable Shackelford Miller, Jr., Circuit Judge of the United States Court of Appeals for the Sixth Circuit, the Honorable Leslie R. Darr and the Honorable Robert L. Taylor, Judges of the United States District Court for the Eastern District of Tennessee to show cause why a writ of mandamus should not be issued against them in accordance with the prayer of said petition, and why your petitioners

should not have such other and further relief in the premises as may be just and meet.

Z. Alexander Looby,
Robert L. Carter,
Thurgood Marshall,
Counsel for Petitioners.

Carl A. Cowan,
Avon N. Williams, Jr.,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. . . . . Miscellaneous

EX PARTE GENE MITCHELL GRAY, LINCOLN ANDERSON BLAKENEY, JOSEPH HUTCH PATTERSON and JACK ALEXANDER.

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION, TO THE HONORABLE SHACKELFORD MILLER, JR., JUDGE, UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, THE HONORABLE LESLIE R. DARR AND THE HONORABLE ROBERT L. TAYLOR, JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

To the Honorable Fred M. Vinson, Chief Justice of the United States and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioners respectfully show the following:

1. Petitioner, Gene Mitchell Gray, applied for admission to the University of Tennessee, such application being for registration and enrollment in the graduate school on the first day of the 1950 fall quarter. Petitioner, Joseph Hutch Patterson, applied for admission to the University of Tennessee, his application being for registration and enrollment on the first day of the 1951 winter quarter. Peti-

tioners, Lincoln Anderson Blakeney and Jack Alexander, sought permission to enroll in the law school of the University of Tennessee on the first day of the 1951 winter quarter.

2. Petitioners are citizens of the United States and of the State of Tennessee. They meet all lawful qualifications requisite for admission to the University to pursue the courses of study for which they applied, and their applications would have been accepted except for the fact that petitioners are Negroes.

3. The University of Tennessee is state owned and operated and is the only state institution where petitioners can receive the educational facilities, opportunities and advantages which they are seeking.

4. The Board of Trustees of the University of Tennessee met on December 4, 1950 and refused to admit petitioners to the University of Tennessee because they are Negroes. This action was taken in a formal order which reads as follows:

> "Whereas, the Constitution and the Statutes of the State of Tennessee expressly provide that there shall be segregation in the education of the races in schools and colleges in the State and that a violation of the laws of the State in this regard subjects the violator to prosecution, conviction and punishment as therein provided; and,
>
> "Whereas, this Board is bound by the Constitutional provision and the acts referred to;
>
> "Be it therefore resolved, that the applications by members of the Negro race for admission as students into The University of Tennessee be and same are hereby denied."

5. Petitioners thereupon filed a complaint in the United States District Court for the Eastern District of Tennessee pursuant to Title 28, United States Code, Sections 1331, 1343 and 2281 seeking a preliminary and permanent injunction restraining the university officials from refusing to admit them to the University of Tennessee because of their race and color, and from enforcing Article 11, Section 12 of the Constitution of Tennessee, Sections 11395, 11396, 11397 of the Code of Tennessee, and the December 4, 1950 order of the Board on the grounds that enforcement of the Constitution, statutes and order was unconstitutional in that petitioners were thereby denied the equal protection of the laws as guaranteed under the Fourteenth Amendment to the Constitution of the United States.

6. In the answer filed on behalf of the University, it was admitted that petitioners' applications had been refused pursuant to Article 11, Section 12 of the Constitution and Sections 11395, 11396 and 11397 of the Code of Tennessee, which made it unlawful for Negro and white students to attend the same schools. No question was raised with respect to petitioners' qualifications, and it was not denied that the University of Tennessee was the only state institution offering the courses of study petitioners desired to pursue. Whereupon, petitioners filed a motion for judgment on the pleadings.

7. A special three-judge district court was convened pursuant to Title 28, United States Code, Section 2284, and a hearing before such court was held in Knoxville, Tennessee on March 13, 1951.

8. On April 13, 1951, this specially constituted court rendered an opinion in which it held that the issues in-

volved in the case were not appropriate for disposition by a three-judge court and ordered the court dissolved. Its order reads in part as follows:

> "* * * the two Judges designated by the Chief Judge of the Circuit to sit with the District Judge, in whose District the action was filed, do now withdraw from the case, and that the case proceed before said District Judge in the District of its filing.'"

9. On April 20, 1951 the United States District Court for the Eastern District of Tennessee, Northern Division, without further hearing handed down an opinion in which it was held that petitioners had been denied the equal protection of the laws, and that they were entitled to be admitted to the University of Tennessee. The court, however, refused to issue an injunctive decree stating:

> "Believing that the University authorities will either comply with the law as herein declared or take the case up on appeal, the Court does not deem an injunctive order presently to be appropriate. The case, however, will be retained on the docket for such orders as may seem proper when it appears that the applicable law has been finally declared" 97 F. Supp. 463.[2]

10. Petitioners, believing that their applications for temporary and permanent injunctions to enjoin the University officials from barring their admission to the University pursuant to the state constitution, statutes and order of the Board of Trustees required decision by a district court of three judges and that the order of April 13th dissolving the district court constituted a denial of their application, appealed to this Court pursuant to Title 28, United States Code, Sections 1253 and 2101(b). Such appeal is now pending before this Court as case No. 120.

1. The opinion and order are set forth in Appendix A.
2. The opinion of the Court is set forth as Appendix B.

11. Either the order of April 13, 1951, in which the district court of three judges refused to take any action on petitioners' application for a temporary and permanent injunction, on the grounds that the cause was not appropriate for their determination, constitutes a denial of the application for a temporary and permanent injunction within the meaning of Title 28, United States Code, Section 1253, and direct appeal to this Court is appropriate.

12. Or the order of April 13, 1951 involves refusal by the court below to perform a mandatory act required by Title 28, United States Code, Section 2281, and petitioners must seek the issuance of a writ of mandamus from this Court.

WHEREFORE, petitioners pray that in the event that petitioners' direct appeal in case No. 120 is considered improper and is denied, a writ of mandamus issue from this Court directed to the Honorable the United States District Court for the Eastern District of Tennessee, Northern Division, the Honorable Shackelford Miller, Jr., Circuit Judge of the United States Court of Appeals for the Sixth Circuit, the Honorable Leslie R. Darr and the Honorable Robert L. Taylor, Judges of the United States District Court for the Eastern District of Tennessee to show cause on a day to be fixed by this Court why mandamus should not issue from this Court directing said Honorable Shackelford Miller, Jr., Circuit Judge of the United States Court of Appeals for the Sixth Circuit, and the Honorable Leslie R. Darr and the Honorable Robert L. Taylor, Judges of the United States District Court to vacate and expunge from the record and the order of April 13, 1951 dissolving the three-judge court and the subsequent action of Honorable Robert L. Taylor in which he proceeded to pass upon the issues involved in this case.

That petitioners have such additional relief and process that may be necessary and appropriate in the premises.

Respectfully submitted,

Z. Alexander Looby,
Robert L. Carter,
Thurgood Marshall,
Counsel for Petitioners.

Carl A. Cowan,
Avon N. Williams, Jr.,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. ..... Miscellaneous

EX PARTE GENE MITCHELL GRAY, LINCOLN ANDERSON BLAKENEY, JOSEPH HUTCH PATTERSON and JACK ALEXANDER.

BRIEF IN SUPPORT OF MOTION AND PETITION FOR WRIT OF MANDAMUS

Opinions Below

The opinion and order of the United States District Court, entered April 13, 1951, dissolving the specially constituted three-judge District Court which heard this cause is unreported and is appended hereto as Appendix A. The opinion of the United States District Court, of April 20, 1951, which held that petitioners were entitled to be admitted to the University of Tennessee but which refused to grant injunctive relief is reported in 97 F. Supp. 463 and is appended hereto as Appendix B.

Jurisdiction

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1651 (a) since the ordinary remedy of appeal and certiorari may be unavailable and

inadequate, and petitioners' right to take an appeal in this case, pursuant to Title 28, United States Code, Section 1253 is beclouded with doubt.

Questions Presented

1. Whether, after notice and hearing, the Honorable SHACKELFORD MILLER, JR., Circuit Judge of the United States Court of Appeals for the Sixth Circuit, the Honorable LESLIE R. DARR, and the Honorable ROBERT L. TAYLOR, Judges of the United States District Court for the Eastern District of Tennessee, in issuing the order of April 13, 1951 dissolving the specially-constituted three-judge court on the grounds that the issue was not appropriate for decision by a three-judge court under the provisions of Title 28, United States Code, Section 2281, failed to perform the ministerial duties of their office as required under Title 28, United States Code, Section 2281 and 2284.

2. Whether the Honorable ROBERT L. TAYLOR, who ruled on April 20, 1951 that petitioners were entitled to be admitted to the University of Tennessee but who refused to grant injunctive relief, exceeded his jurisdiction in view of the fact that the disposition of the case herein required action by a district court of three judges.

3. Whether this Court should issue a mandate ordering the Honorable SHACKELFORD MILLER, JR., Circuit Judge of the United States Court of Appeals for the Sixth Circuit, the Honorable LESLIE R. DARR and the Honorable ROBERT L. TAYLOR, Judges of the United States District Court for the Eastern District of Tennessee to make a final determination of petitioners' application for a temporary and permanent injunction to enjoin the University officials from refusing to admit them to the University of Tennessee and from enforcing Article 11, Section 12 of the Constitu-

tion of the State of Tennessee, Sections 11395, 11396, 11397 of the Code of Tennessee, and the December 4, 1950 order of the Board of Trustees on the grounds that such enforcement constitutes an unconstitutional deprivation of petitioners' rights.

Statutes Involved

The statutory provisions involved in this case are as follows:

Article 11, Section 12 of the Constitution of the State of Tennessee reads as follows:

> "* * * And the fund called the common school fund, and all the lands and proceeds thereof * * * heretofore by law appropriated by the General Assembly of this State for the use of common schools, and all such as shall hereafter be appropriated, shall remain a perpetual fund, * * * and the interest thereof shall be inviolably appropriated to the support and encouragement of common schools throughout the State, and for the equal benefit of all the people thereof. * * * No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school. * * *"

Section 11395 of the Code of Tennessee reads as follows:

> "* * * It shall be unlawful for any school, academy, college, or other place of learning to allow white and colored persons to attend the same school, academy, college, or other place of learning."

Section 11396 of the Code of Tennessee reads as follows:

> "* * * It shall be unlawful for any teacher, professor, or educator in any college, academy, or

school of learning, to allow the white and colored races to attend the same school, or for any teacher or educator or other person to instruct or teach both the white and colored races in the same class, school, or college building, or in any other place or college building, or in any other place or places of learning, or allow or permit the same to be done with their knowledge, consent or procurement."

Section 11397 of the Code of the State of Tennessee reads as follows:

"* * * Any person violating any of the provisions of this article, shall be guilty of a misdemeanor, and, upon conviction, shall be fined for each offense fifty dollars, and imprisonment not less than thirty days nor more than six months."

Statement

Petitioners applied for admission to the graduate and professional schools of the University of Tennessee. They met all the requirements for admission thereto except for the fact that they are Negroes. The University of Tennessee is the only institution maintained and operated by the state which offers the courses of study which petitioners desire to pursue.

On December 4, 1950 the Board of Trustees of the University of Tennessee issued a formal order in which it denied petitioners' applications for admission to the University on the grounds that to admit them would be violative of the Constitution and statutes of the State. Petitioners filed a complaint, pursuant to Title 28, United States Code, Section 2281, to restrain the enforcement of Article 11, Section 12 of the Constitution of Tennessee; Sections 11395, 11396 and 11397 of the Code of Tennessee and the December 4, 1950 order of the Board of Trustees

on the grounds that such enforcement constituted an unconstitutional deprivation of petitioners' rights.

The University, in answer to petitioners' complaint, admitted that their applications had been refused pursuant to the Constitution and statutes of the State of Tennessee. Petitioners thereupon filed a motion for judgment on the pleadings.

A three-judge district court convened, in accordance with Title 28, of the United States Code, Sections 2281 and 2284, and met in Knoxville, Tennessee on March 13, 1951 for a hearing on the cause. On April 13, 1951 that court held that the issues raised in petitioners' complaint were not appropriate for decision by a three-judge court and ordered the matter to proceed before the District Judge of the United States District Court for the Eastern District of Tennessee, Northern Division, in which suit was filed. That court subsequently handed down an opinion holding that petitioners were entitled to be admitted to the University of Tennessee, but injunctive relief was refused on the grounds that the University officials would either comply with the law or would take an appeal. As of now, petitioners have not been admitted to the University of Tennessee nor have the University officials given any indication that petitioners will be admitted except under court mandate.

ARGUMENT

This Court may properly issue a Writ of Mandamus directing a district court of three judges to determine petitioner's right to injunctive relief applied for pursuant to Title 28, United States Code, Section 2281.

Petitioners were here refused admission to the University of Tennessee solely because of their race and color, pursuant to the December 4, 1950 order of the Board of Trustees of the University. This order was based on Article 11, Section 12 of the State Constitution and Sections 11395, 11396 and 11397 of the Code of Tennessee, which make it unlawful for Negro and white students to be educated together in the same school. Petitioners sought an injunction against enforcement of these provisions on the grounds that such enforcement deprived them of the equal protection of the laws, and hence that Article 11, Section 12 of the Constitution of Tennessee, Sections 11395, 11396 and 11397 of the Code of Tennessee and the December 4, 1950 order of the Board of Trustees of the University were unconstitutional as applied. Thus the cause was brought squarely under the provisions of Title 28, United States Code, Section 2281, and a *prima facie* case for determination by a district court of three-judges was presented. *Modern Woodmen of America* v. *Casados*, 15 F. Supp. 483 (D. C. New Mexico 1936); *Ex parte Metropolitan Water Co.*, 220 U. S. 539. The University officials, in their defense to petitioners' complaint, admitted that petitioners had been denied admission to the University pursuant to the state's constitutional provisions and statutes, enforcement of which petitioners were seeking to enjoin, which forbade the commingling together of Negro and white students in the same schools.

There can no longer be any doubt that Negro applicants must be accorded educational opportunities and advantages

under the same terms and conditions as these opportunities and advantages are afforded white students, and at the same time. *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337; *Sipuel* v. *Board of Regents*, 332 U. S. 631; *Sweatt* v. *Painter*, 339 U. S. 629; *McLaurin* v. *Board of Regents*, 339 U. S. 637; and *Watson* v. *Board of Supervisors*, 94 L. ed. (Ad. Op.) 200, have made it clear that any form of racial segregation practiced at the professional and graduate school levels of state universities violates the equal protection clause of the Fourteenth Amendment. Here, however, the University of Tennessee was the only state institution offering the courses which petitioners desired to pursue. Under these circumstances, without regard to the present constitutional vitality of the "separate but equal" doctrine of *Plessy* v. *Ferguson*, 163 U. S. 537, with respect to graduate and professional education, Article 11, Section 12 of the Constitution of Tennessee and Sections 11395, 11396 and 11397 of the Code of Tennessee are unconstitutional as applied, in that pursuant to their provision petitioners were prohibited from being admitted to the University of Tennessee, *Missouri ex rel. Gaines* v. *Canada*, *supra*, and petitioners are entitled to injunctive relief against unconstitutional enforcement of these provisions, *McLaurin* v. *Board of Regents*, *supra*. Petitioners' cause, therefore, properly required adjudication by a district court of three judges, *Fleming* v. *Rhodes*, 331 U. S. 100; *McLaurin* v. *Board of Regents*, *supra*; *Driscoll* v. *Edison Light and Power Co.*, 307 U. S. 104; *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290; *Eichholz* v. *Public Service Commission*, 306 U. S. 268; *Query* v. *United States*, 316 U. S. 486.

It is clear that petitioners would have been entitled to a writ of mandamus from this Court had the court below refused to convene a district court of three judges as provided in Title 28, United States Code, Sections 2281 and 2284. *Ex parte Collins*, 277 U. S. 565, 566, *Ex Parte Bransford*, 310 U. S. 354, 355; *Stratton* v. *St. Louis Southwest*

APPENDIX "A"

UNITED STATES DISTRICT COURT, FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION

Civil Action No. 1567

GENE MITCHELL GRAY, LINCOLN ANDERSON BLAKENEY, JOSEPH HUTCH PATTERSON AND JACK ALEXANDER, Plaintiffs,

v.

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF TENNESSEE, ETC., ET AL., Defendants

Before MILLER, Circuit Judge, DARR and TAYLOR, District Judges.

MILLER, Circuit Judge. The plaintiffs by this action seek to enjoin the Board of Trustees of the University of Tennessee, the University of Tennessee, and certain of its officers from denying them admission to the Graduate School and to the College of Law of the University because they are members of the Negro race.

In brief, the complaint alleges that the plaintiffs are citizens of the United States and of the State of Tennessee, are residents of and domiciled in the City of Knoxville, State of Tennessee, and are members of the Negro race; that plaintiffs, Gene Mitchell Gray and Jack Alexander, are fully qualified for admission as graduate students to the Graduate School of the University; that plaintiffs Lincoln Anderson Blakeney and Joseph Hutch Patterson are fully qualified for admission as undergraduate students in law to the College of Law of the University; that the four plaintiffs are ready, willing and able to pay all lawful charges and fees, and to comply with all lawful rules and regulations, requisite to their admission; that the University of Tennessee is a corporation duly organized and existing under the laws of Tennessee, was established and is operated as a State function by the State of Tennessee, with two of its integral parts or departments being the Graduate

School and the College of Law; that it operates as an essential part of the public school system of the State of Tennessee, maintained by appropriations from the public funds of said State raised by taxation upon the citizens and taxpayers of the State including the plaintiffs; that there is no other institution maintained or operated by the State at which plaintiffs might obtain the graduate or legal education for which they have applied to the University of Tennessee; that the plaintiffs Gene Mitchell Gray and Jack Alexander applied for admission as graduate students to the Graduate School of the University and that the plaintiffs Lincoln Anderson Blakeney and Joseph Hutch Patterson applied for admission as undergraduate students in law to the College of Law of the University; and that on or about December 4, 1950, the Board of Trustees of the University refused and denied each and all of their applications for admission because of their race or color, relying upon the Constitution and Statutes of the State of Tennessee providing that there shall be segregation in the education of the races in the schools and colleges in the State. Plaintiffs contend that the action of the defendants in denying them admission to the University denies the plaintiffs, and other Negroes similarly situated, because of their race or color, their privileges and immunities as citizens of the United States, their liberty and property without due process of law, and the equal protection of the laws, secured by the 14th Amendment of the Constitution of the United States and by Section 41, Title 8, United States Code.

The defendants, by answer, state that they are acting under and pursuant to the Constitution and the Statutes of the State of Tennessee, by which they are enjoined from permitting any white and negro children to be received as scholars together in the same school; that provision has been made by Tennessee Statutes to provide professional education for colored persons not offered to them in state colleges for Negroes but offered for white students in the University of Tennessee; that the State of Tennessee, under its Constitution and Statutes and under its police power, has adopted reasonable regulations for the operation of its

institutions based upon established usages, customs and traditions, and such regulations being reasonable are not subject to challenge by the plaintiffs; and that the 14th Amendment of the Constitution of the United States did not authorize the Federal Government to take away from the State the right to adopt all reasonable laws and regulations for the preservation of the public peace and good order under the inherent police power of the State.

The plaintiffs requested a hearing by a three-judge court under the provisions of Title 28 U. S. Code, Section 2281, and moved for judgment on the pleadings in that the pleadings showed that there was no dispute as to any material fact and they were entitled to judgment as a matter of law. The present three-judge court was designated and in due course the case was argued before it.

We are of the opinion that the case is not one for decision by a three-judge court. Title 28 U. S. Code, Section 2281, requires the action of a three-judge court only when an injunction is issued restraining the action of any officer of the State upon the ground of the unconstitutionality of such statute. We are of the opinion that the case presents a question of alleged discrimination on the part of the defendants against the plaintiffs under the equal protection clause of the 14th Amendment, rather than the unconstitutionality of the statutory law of Tennessee requiring segregation in education. As such, it is one for decision by the District Judge instead of by a three-judge court.

The plaintiffs rely chiefly upon the decisions of the Supreme Court in *Missouri* v. *Canada*, 305 U. S. 337, *Sipuel* v. *Board of Regents*, 332 U. S. 631, *Sweatt* v. *Painter*, 339 U. S. 629 and *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637, in which State Universities were required to admit qualified negro applicants. In each of those cases the plaintiff was granted the right to be admitted to the State University on equal terms with white students because of the failure of the State to furnish to the negro applicant educational facilities equal to those furnished white students at the State University. The rulings therein are based upon illegal discrimination under the equal protection clause of the 14th Amendment, not upon the unconstitu-

tionality of a State statute. In *Sweatt* v. *Painter*, supra, the Court expressly pointed out (339 U. S. at Page 631) that it was eliminating from the case the question of constitutionality of the State statute which restricted admission to the University to white students. Those cases did not change the rule, previously laid down by the Supreme Court, that State legislation requiring segregatoin was not unconstitutional because of the feature of segregation, *Plessy* v. *Ferguson*, 163 U. S. 537; *McCabe* v. *Atchison T. & S. F. Ry. Co.*, 235 U. S. 151, provided equal facilities were furnished to the segregated races. In *Sweatt* v. *Painted*, supra, the Supreme Court declined (339 U. S. at Page 636) to re-examine its ruling in *Plessy* v. *Ferguson*, supra. In *Berea College* v. *United States*, 211 U. S. 45, and *Gong Lum* v. *Rice*, 275 U. S. 78, state segregation statutes dealing specifically with education were not held to be unconstitutional. The validity of such legislation was recognized in *Missouri* v. *Canada*, supra, wherein the Court stated (305 U. S. at page 344)—"The State has sought to fulfill that obligation by furnishing equal facilities in separate schools, a method the validity of which has been sustained by our decisions." In that case, as well as in *Sweatt* v. *Painter*, supra, there were State statutes which required segregation for the purpose of higher education, but the decisions in those cases did not declare those statutes unconstitutional.

By Chapter 43 of the Public Acts of 1941, the State of Tennessee authorized and directed the State Board of Education and the Commissioner of Education to provide educational training and instruction for negro citizens of Tennessee equivalent to that provided at the University of Tennessee by the State of Tennessee for white citizens of Tennessee, such training and instruction to be made available in a manner to be prescribed by the State Board of Education and the Commissioner of Education, provided, that the members of the negro race and white race should not attend the same institution or place of learning. The Supreme Court of Tennessee has held that Act to be mandatory in character. *State ex rel. Michael* v. *Witham*, 179 Tenn. (15 Beeler) 250. Such legislation, specifically requiring equal educational training and instruction for white and negro

citizens, appears to go further than did some of the State Statutes involved in the Supreme Court cases above referred to, which were not declared unconstitutional in those cases. In our opinion, this case does not turn upon the unconstitutionality of the state statutes, but presents the same issue as was presented to the Supreme Court in *Missouri* v. *Canada*, supra, *Sipuel* v. *Board of Regents*, supra, *Sweatt* v. *Painter*, supra, and *McLaurin* v. *Oklahoma State Regents*, supra, namely, the question of discrimination under the equal protection clause of the 14th Amendment. Accordingly, this case, at least in its present stage, is one for decision by the District Judge, in the district of its filing, on the issue of alleged discrimination against the plaintiffs under the equal protection clause of the 14th Amendment. Such an issue does not address itself to a three-judge court. *Ex parte Bransford*, 310 U. S. 354; *Ex parte Collins*, 277 U. S. 565; *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568-574.

The two Judges designated by the Chief Judge of the Circuit to sit with the District Judge in the hearing and decision of this case do now accordingly withdraw from the case, which will proceed in the District Court where it was originally filed. See Lee v. Roseberry, 94 Fed. Supp. 324, 328.

UNIITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF TENNESSEE, NORTHERN DIVISION

1567

GENE MITCHELL GRAY, LINCOLN ANDERSON BLAKENEY, JOSEPH HUTCH PATTERSON and JACK ALEXANDER, *Plaintiffs*,

v.

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF TENNESSEE, ETC., et al., *Defendants*

ORDER

Before Miller, Circuit Judge; Darr and Taylor, District Judges

This case was heard on the record, briefs and argument of counsel for respective parties.

And the Court being of the opinion that the issue involved is alleged unjust discrimination against the plaintiffs under the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States, and not the constitutionality of certain statutes of the State of Tennessee, referred to in the pleadings;

And such issue not being one for decision by a three-judge court under the provisions of Section 2281, Title 28, U. S. Code;

It is ordered that the two Judges designated by the Chief Judge of the Circuit to sit with the District Judge, in whose District the action was filed, do now withdraw from the case, and that the case proceed before said District Judge in the District of its filing.

(S.) SHACKELFORD MILLER, JR.,
Circuit Judge;

(S.) LESLIE R. DARR,
District Judge;

(S.) ROBT. L. TAYLOR,
District Judge.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION

Civil No. 1567

GENE MITCHELL GRAY et al.

vs.

UNIVERSITY OF TENNESSEE et al.

This case was heard by a three-judge court on the record, briefs and argument of counsel for the respective parties on plaintiffs' motion for summary judgment in their favor under Rule 56 of the Federal Rules of Civil Procedure.

In an opinion by Circuit Judge Miller, in which Chief District Judge Darr and District Judge Taylor of the Eastern District of Tennessee, concurred, the Court held that the issue involved is alleged unjust discrimination against the plaintiffs under the equal protection clause of the Fourteenth Amendment of the Constitution of the United States and not the constitutionality of the Tennessee statutes and constitutional provisions referred to in the complaint. Following this opinion and the order entered pursuant thereto, Judge Miller and Judge Darr withdrew from the case, which is now before this Court for decision on the motion.

Plaintiffs Gray and Alexander have applied for admission to the Graduate School and plaintiffs Blakeney and Patterson have applied for admission to the College of Law, of the University of Tennessee. All admittedly are qualified for admission, except for the fact that they are negroes.

The matter of their applications was referred by University authorities to the Board of Trustees, who disposed of the matter by the following resolution:

> "Whereas, the Constitution and the statutes of the State of Tennessee expressly provide that there shall be segregation in the education of the races in schools

and colleges in the State and that a violation of the laws of the State in this regard subjects the violator to prosecution, conviction, and punishment as therein provided; and,

"Whereas, this Board is bound by the Constitutional provision and acts referred to;

"Be it therefore resolved, that the applications by members of the Negro race for admission as students into The University of Tennessee be and the same are hereby denied."

Following the indicated action by the Board of Trustees, plaintiffs filed their joint complaint for themselves and on behalf of all negro citizens similarly situated, praying for a temporary and, after hearing, a permanent order restraining the defendants from executing the exclusion order of the Board of Trustees against the plaintiffs, or other negroes similarly situated, and from all action pursuant to the constitution and statutes of the State of Tennessee, and the custom or usage of the defendants, respecting the requirement of segregation of whites and negroes in state-supported educational institutions and exclusion of negroes from the University of Tennessee, their references being to Article 11, sec. 12, of the state constitution, to sections 2403.1, 2403.3, 11395, 11396, and 11397 of the Tennessee Code, and the custom and usage of defendants of excluding negroes from all colleges, schools, departments, and divisions of the University of Tennessee, including the Graduate School and the College of Law.

Defenses interposed are nine in number, but in substance they are these: That defendants, in rejecting the applications of the plaintiffs, were and are obeying the mandates of the segregation provisions of the constitution and laws of the State of Tennessee; that those provisions are in exercise of the police powers reserved to the states and are valid, the Fourteenth Amendment and laws enacted thereunder to the contrary notwithstanding, and that these plaintiffs have no standing to bring this action for the reason that they have not exhausted their administrative remedies under the equivalent facilities act of 1941, Code section

2403.3. The plaintiffs, after alleging in their complaint that the University of Tennessee maintains a Graduate School and a College of Law which offer to white students the courses sought by plaintiffs, make the following specific allegation, which defendants, for failure to deny, admit: "There is no other institution maintained or operated by the State of Tennessee at which plaintiffs might obtain the graduate and/or legal education for which they respectively have applied to The University of Tennessee."

It is, of course, recognized that the Constitution of the United States is one of enumerated and delegated powers. To remove original doubt as to the character of federal powers, the states adopted the Tenth Amendment, which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Constitution contains no specific delegation of police powers, and those powers are accordingly reserved. But a glance discloses that, in relation to the Tenth Amendment, the Constitution contains two groups of powers, namely, the previously-delegated powers and the subsequently-delegated powers. By adoption of the Fourteenth Amendment, following adoption of the Tenth Amendment, the states consented to limitations upon their reserved powers, particularly in the following respects: ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . ."

It is recognized that "the police power of a state extends beyond health, morals and safety, and comprehends the duty, *within constitutional limitations*, to protect the well-being and tranquility of a community." Kovacs v. Cooper, 336 U. S. 77, 83. (Italics supplied). States "have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, *so long as their laws do not run afoul of some specific constitutional prohibition, or of some valid federal law.*" Whitaker v. North Carolina, 335, U. S. 525, 536. (Italics supplied).

In the foregoing quotations, the italicized portions point up the limitations upon the exercise of a state's police powers.

Segregation by law may, in a given situation, be a valid exercise of the state's police powers. It has been so recognized with respect to schools. Gong Lum et al v. Rice et al, 275 U. S. 78. Also, as to segregation on intrastate trains. Plessy v. Ferguson, 163 U. S. 537. But where enforcement by the state of a law ran afoul of the Fourteenth Amendment by denying members of a particular race or nationality equal rights as to property or the equal protection of the laws, the state action has been condemned. This was the result where state law discriminated against aliens as to the privilege of employment. Truax v. Raich, 239 U. S. 33. The same result was reached as to enforcement of restrictive covenants in deeds, Shelley et ux v. Kraemer et ux, 334 U. S. 1; in the housing segregation cases, Richmond v. Deans, 4 Cir., 37 F. 2d 712, affirmed 281 U. S. 704; Buchanan v. Warley, 245 U. S. 60: and in the cases where segregation has resulted in inequality of educational opportunities for negroes, Sweatt v. Painter et al, 339 U. S. 629; McLaurin v. Oklahoma State Regents, 339 U. S. 637. From these cases it appears to be well settled that exercise of the state's police powers ceases to be valid when it violates the prohibitions of the Fourteenth Amendment. The defense on this ground, therefore, fails.

The second question is whether the plaintiffs have present standing to bring this action. To understand the defense interposed here, it is desirable to look at the historical background of the act of 1941, of which the Court takes judicial notice.

On October 18, 1939, six negroes applied for admission to the University of Tennessee, four to the Graduate Department and two to the College of Law. Being denied admission, they filed their separate petitions for mandamus in the Chancery Court of Knox County, Tennessee, to require their admission. Following denial of the petitions in a consolidated proceeding, an appeal was taken to the Supreme Court of Tennessee, where the action of the Chancellor was affirmed by opinion filed November 7, 1942. State

ex rel. Michael et al. v. Witham et al., 179 Tenn. 250. The case was not disposed of by the Chancellor on its merits, but on the ground that it had become moot. While the case was pending in the Chancery Court, the state legislature enacted the act of 1941, now carried in the Code as sec. 2403[illegible], and entitled, *Educational facilities for negro citizens equivalent to those provided for white citizens:*

> "The state board of education and the commissioner of education are hereby authorized and directed to provide educational training and instruction for negro citizens of Tennessee equivalent to that provided at the University of Tennessee by the State of Tennessee for white citizens of Tennessee. Such training and instruction shall be made available in a manner to be prescribed by the state board of education and the commissioner of education; provided, that members of the negro race and white race shall not attend the same institution or place of learning. The facilities of the Agricultural and Industrial State College, and other institutions located in Tennessee, may be used when deemed advisable by the state board of education and the commissioner of education, insofar as the facilities of same are adequate."

Following enactment of the statute a supplemental answer was filed in the case then pending, in which it was averred that pursuant to the Act certain committees had been appointed by the state board of education, with instructions to report at the board's next regular meeting, an averment which suggested that the act of 1941 was to be made operative expeditiously.

The Supreme Court of Tennessee, in affirming the Chancellor's dismissal of the consolidated case, construed the act of 1941 to be mandatory in character. "No discretion whatever is vested in the State Board of Education under the Act as to performance of its mandates. The manner of providing educational training and instruction for negro citizens equivalent to that provided for white citizens at the University of Tennessee is for the Board of Education to determine in its sound discretion, but the furnishing of such

equivalent instruction is mandatory." State ex rel. Michael et al. v. Witham et al., 179 Tenn. 250, 257.

The court also said at page 257: "Upon the demand of a negro upon the State Board of Education for training and instruction in any branch of learning taught in the University of Tennessee, it is the duty of the Board to provide such negro with equal facilities of instruction in such subjects as that enjoyed by the students of the University of Tennessee. The State Board of Education is entitled to reasonable advance notice of the intention of a negro student to require such facilities . . . No such advance notice by appellants is shown in the record."

At page 258, the court further said: "It does not appear that the State Board of Education is seeking in any way to evade the performance of the duties placed upon it by Chapter 43, Public Acts 1941, or that it is lacking sufficient funds to carry out the purposes of the Act. The state having provided a full, adequate and complete method by which negroes may obtain educational training and instruction equivalent to that provided at the University of Tennessee, a decision of the issues made in the consolidated causes becomes unnecessary and improper. The legislation of 1941 took no rights away from appellants; on the contrary the right to equality in education with white students was specifically recognized and the method by which those rights would be satisfied was set forth in the legislation. What more could be demanded?"

By failure to deny the allegations of the complaint, defendants admit that the directive, though mandatory, has not been carried out. Nevertheless, it is urged by defendants that these plaintiffs have no standing here until they have petitioned the state board of education to furnish the equivalent educational training and instruction for negroes provided for by the act. The Supreme Court of the state noted in its opinion that the then applicants for admission to the University of Tennessee had given to the state board "no such advance notice" of a desire to be furnished facilities under the act. That omission is understandable here for the reason that their applications for admission to the University of Tennessee had not been finally disposed of by

the courts, and the need of their applying to the state board had not been established.

Since the enactment of the Act of 1941 and the decision in State ex rel. Michael et al. v. Witham et al., 179 Tenn. 250, the Supreme Court of the United States has emphasized the pronouncement of one of its older cases as to a particular element of equal protection. In Missouri ex rel. Gaines v. Canada, 305 U. S. 337, it appeared that Lincoln University, a state-supported school for negroes, intended to establish a law school. As to this intention the court said: ". . . it cannot be said that a mere declaration of purpose, still unfulfilled, is enough." Missouri ex rel. Gaines v. Canada, 305 U. S. 337, 346. In the same case, at page 351, the court said: "Here, petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, . . ." Later declarations indicate that the two quotations should be read together and that when so read they state the requirement of equality of opportunity to be personal and immediate.

In Fisher v. Hurst, 333 U. S. 147, the court emphasized its position that equality of opportunity in education means present equality, not the promise of future equality. This re-emphasized the necessity of equality as to time of an earlier decision, where the court said: "The State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group." Sipuel v. Board of Regents of the University of Oklahoma et al., 332 U. S. 631. In the holding in McLaurin v. Oklahoma State Regents, 339 U. S. 637, 642, the court said: "We conclude that the conditions under which this appellant is required to receive his education deprive him of his personal and present right to the equal protection of the laws." That equality of educational opportunity for negroes means present equality was emphasized once more in Sweatt v. Painter et al., 339 U. S. 629, 635: "This Court has stated unanimously that 'The State must provide (legal education)

Railway Co., 282 U. S. 10, 16. It is further clear that if this is a proper cause for adjudication by a district court of three judges that Judge Taylor's disposition of the cause in his April 20th opinion is a nullity, *Stratton* v. *St. Louis Southwest Railway Co.*, *supra*, and certainly he, sitting alone, could not have granted the injunctive relief for which petitioners applied.

The basic error, however, of which petitioners complain is the April 13th order of the district court of three judges, which had been properly convened and which, on March 13, 1951 had held a hearing on petitioners' application for injunctive relief. Where a district court of three judges refused to act on a question in which their determination is made mandatory by statutes, this Court may issue a writ of mandamus requiring them to do so. In the matter of the *Public National Bank of New York*, 278 U. S. 101; *Osage Tribe of Indians* v. *Ickes*, 45 F. Supp. 178, 186, 187 (DC. 1942). It is submitted that a writ of mandamus should be granted in this case.

Conclusion

The question, however, is not free from doubt since the order of April 13th dissolving the specially constituted court and ordering the cause to proceed before a district judge sitting alone could be considered a denial of petitioners' application for a temporary and a permanent injunction. If so considered, petitioners' proper recourse is to invoke Title 28, United States Code, Section 1253, and appeal directly to this Court. See *Smith* v. *Wilson*, 273 U. S. 388; *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386. Petitioners are not certain whether direct appeal or application to this Court for a writ of mandamus is their proper procedural remedy. Having already taken an appeal to this Court, therefore, petitioners

are here making application for the issuance of a writ of mandamus in the event their appeal should be considered procedurally improper.

Respectfully submitted,

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[Appendices Follow]

for (petitioner) in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group'. Sipuel v. Board of Regents, 332 U.S. 631, 633." In view of these recent declarations of the Supreme Court of the United States, this Court is forced to conclude that the defense of exhaustion of administrative remedies fails.

The Court finds that under the Gaines, Sipuel, Sweatt and McLaurin cases heretofore cited, these plaintiffs are being denied their right to the equal protection of the laws as provided by the Fourteenth Amendment and holds that under the decisions of the Supreme Court the plaintiffs are entitled to be admitted to the schools of the University of Tennessee to which they have applied for admission. Believing that the University authorities will either comply with the law as herein declared or take the case up on appeal, the Court does not deem an injunctive order presently to be appropriate. The case, however, will be retained on the docket for such orders as may seem proper when it appears that the applicable law has been finally declared.

(S.) Robt. L. Taylor,
United States District Judge.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 159 Misc.

EX PARTE GENE MITCHELL GRAY, LINCOLN ANDERSON BLAKENEY, JOSEPH HUTCH PATTERSON AND JACK ALEXANDER,

Petitioners.

ON PETITION FOR WRIT OF MANDAMUS

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

Opinions Below

After notice and hearing, the statutory three-judge District Court for the Eastern District of Tennessee convened pursuant to Title 28, United States Code, Section 2281 disclaimed jurisdiction and remanded the cause for proceedings before the District Judge in the District petitioners had filed their complaint. An opinion setting forth the reasons for their action was filed on April 13, 1951. It appears at pages 35-40 of the record and is not officially reported.[1] District Judge TAYLOR, without further hearing or notice to the parties, on April 20, 1951, filed an opinion in which he found that petitioners had been denied the equal protection of the laws, but refused to grant injunctive relief. The cause was retained "for such orders

[1] All record citations are to the record filed in the appeal phase of these proceedings, now pending before this Court as Case #120.

as may be proper when it appears that the appropriate law has been finally declared." His opinion is reported in 97 F. Supp. 463 and may be found at pages 40-47 of the record.

Jurisdiction

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1651(a) since the ordinary remedy of appeal and certiorari may be unavailable and inadequate, and petitioners' right to take an appeal in this case, pursuant to Title 28, United States Code, Section 1253 is beclouded with doubt.

Petitioners made application in the court below for a preliminary and permanent injunction to restrain the enforcement of certain constitutional and statutory provisions of the State of Tennessee, and a December 4, 1950 order of the Board of Trustees of the University of Tennessee, on the grounds that these aforesaid provisions and order deny to petitioners the equal protection of the laws as secured by the Fourteenth Amendment to the Constitution of the United States (R. 1-20). In its answer, the state defended its refusal to admit petitioners to the University of Tennessee on the grounds that it had no other recourse under Article 11, Section 12 of the Constitution and under Sections 11395, 11396 and 11397 of the Code of Tennessee (R. 25-27). Thus, the issue of the constitutionality of the order of an administrative agency and of the laws of the State of Tennessee were squarely in issue in these proceedings, and since injunctive relief is sought, determination by a three judge court is made mandatory under federal statutes.

Statement of the Case

Petitioners, having met all lawful requirements, made due and timely application for admission to the graduate school and the law school of the University of Tennessee. Gene Mitchell Gray sought permission to enroll in the graduate school commencing in the fall quarter of 1950, and Jack Alexander desired approval of his application for enrollment in the graduate school beginning in the winter quarter of 1951. Both Lincoln Anderson Blakeney and Joseph Hutch Patterson desired to enroll in the first-year class of the law school in the winter quarter of 1951 (R. 9).

The University of Tennessee is the only state institution offering the courses petitioners desire to pursue, and they would have been admitted except for the fact that they are Negroes (R. 6). On December 4, 1950, the Board of Trustees of the University of Tennessee met and denied petitioners' application solely because of their color (R. 14). Its action was embodied in the following formal order:

> "Whereas, the Constitution and the Statutes of the State of Tennessee expressly provide that there shall be segregation in the education of the races in schools and colleges in the State and that a violation of the laws of the State in this regard subjects the violator to prosecution, conviction, and punishment as therein provided; and,
>
> "Whereas, this Board is bound by the Constitutional provision and acts referred to;
>
> "Be it therefore resolved, that the applications by members of the Negro race for admission as students into The University of Tennessee be and the same are hereby denied" (R. 14).

The applicable constitutional and statutory provisions on which this order was based are:

Article 11, Section 12 of Constitution of Tennessee:

". . . And the fund called the common school fund, and all the lands and proceeds thereof . . . heretofore by law appropriated by the General Assembly of this State for the use of common schools, and all such as shall hereafter be appropriated, shall remain a perpetual fund, . . . and the interest thereof shall be inviolably appropriated to the support and encouragement of common schools throughout the State, and for the equal benefit of all the people thereof. . . . No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school. . . ."

Section 11395 of the Code of Tennessee:

". . . It shall be unlawful for any school, academy, college, or other place of learning to allow white and colored persons to attend the same school, academy, college, or other place of learning."

Section 11396 of the Code:

". . . It shall be unlawful for any teacher, professor, or educator in any college, academy, or school of learning, to allow the white and colored races to attend the same school, or for any teacher or educator or other person to instruct or teach both the white and colored races in the same class, school, or college building, or in any other place or places of learning, or allow or permit the same to be done with their knowledge, consent or procurement."

and

Section 11397 of the Code:

". . . Any person violating any of the provisions of this article, shall be guilty of misdemeanor, and, upon conviction, shall be fined for each offense fifty dollars, and imprisonment not less than thirty days nor more than six months."

Petitioners thereupon filed a complaint on January 12, 1951, in the court below, in the nature of a class suit in which application was made for both a preliminary and permanent injunction seeking to restrain the enforcement of the December 4 order of the Board of Trustees, and Article 11, Section 12 of the Constitution and Sections 11395, 11396 and 11397 of the Code of Tennessee on the grounds that the aforesaid provisions and order under attack deprived petitioners of rights secured under the Fourteenth Amendment to the Constitution of the United States (R. 1-20).

On February 1, 1951, the state filed its answer, in which no material allegations in petitioners' complaint was controverted and in which the denial of petitioners' admission to the University of Tennessee was defended on the grounds that such denial was required by its constitution and statutes (R. 25-27).

On February 12, 1951, petitioners filed a motion for judgment on the pleadings (R. 28). The court below, which had been convened pursuant to Title 28, United States Code, Sections 2281 and 2284 (R. 28-29) held a hearing in Knoxville, Tennessee, on March 13, 1951, and on April 13, 1951, handed down an opinion in which jurisdiction was disclaimed; the three-judge court was ordered dissolved; and the cause remanded to District Judge Robert Taylor, in whose District the complaint had been filed, for further proceedings (R. 35-40).

On April 20, 1951, Judge Taylor held that the state's refusal to admit petitioners to the University of Tennessee constituted a denial of the equal protection of the laws but refused to issue any affirmative order in enforcement of petitioners' rights (R. 40-47). The cause was brought here on direct appeal. Since the right to direct appeal is in doubt and may be inappropriate, petitioners filed a motion for leave to file a petition for writ of mandamus to secure

the issuance of a mandatory writ from this Court directing the three judge court to reconvene and to make a final determination in this cause. The motion was granted on October 15, 1951, and a rule to show cause issued. Response to the rule was made and on December 3, 1951, this Court ordered argument on this phase of the case.

Error Relied On

The court below erred in refusing to exercise its jurisdiction which had been properly invoked pursuant to the requirements of Title 28, United States Code, Sections 2281 and 2284.

Summary of Argument

Petitioners are here seeking the issuance of a writ of mandamus to require the specially constituted United States District Court for the Eastern District of Tennessee, consisting of the Hon. Shackelford Miller, Jr., Judge, United States Court of Appeals for the Sixth Circuit, Leslie R. Darr, and Robert L. Taylor, Judges, United States District Court for the Eastern District of Tennessee to reconvene in order to finally determine petitioners' right to a temporary and a permanent injunction as applied for in their complaint.

Petitioners sought injunctive relief in the court below against enforcement of a statewide policy, as evidenced in the December 4th order of the Board of Trustees of the University of Tennessee, Article 11, Section 12 of Constitution and Sections 11395, 11396 and 11397 of the Code of Tennessee, all of which prohibit the admission of Negroes to the graduate and professional schools of the University of Tennessee. Because of the nature of the case a hearing and determination by a three judge court was mandatory.

If a single judge had refused to convene a three judge court, it is settled that petitioners' proper recourse was to apply for writ of mandamus in this Court.

Here, however, a three judge court was properly convened, and after notice and hearing held on March 13, 1951, the court declared itself to be without jurisdiction and issued an order dissolving the statutory court and remanded the cause for further proceedings before District Judge Robert Taylor. Such proceedings subsequently took place in accordance with this order. The order remanding the cause to Judge Taylor, sitting alone, could not confer jurisdiction which he did not possess. Only a three-judge district court has jurisdiction to hear and determine petitioners' cause.

This petition has been filed as an alternative remedy in the event the appeal now pending is held to be procedurally improper. Where review by appeal is unavailable, mandamus will lie to require a lower federal court to exercise jurisdiction in a proper case. In this case, if the order dissolving the three-judge court cannot be reviewed on appeal, a writ of mandamus should issue directing the three judges who signed the order to reconvene and render a final decision in this case.

ARGUMENT

I

This cause is one in which a three-judge court has jurisdiction.

A preliminary and a permanent injunction to restrain the enforcement of the December 4th, order of the Board of Trustees, refusing to admit petitioners to the University of Tennessee pursuant to Article II, section 12 of the Constitution of the State and Sections 11395, 11396 and 11397 of the Code of Tennessee are here being sought on the grounds that the order, constitutional provision and statutes deprive petitioners of their right to equal educational opportunities as secured under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. The University officials are state officers, *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337; and the Board of Trustees of the University of Tennessee is an administrative board within the meaning of Title 28, United States Code, Sections 2281 and 2284. *McLaurin* v. *Board of Regents*, 339 U. S. 637; *Board of Supervisors, La. State University* v. *Wilson*, 340 U. S. 909. Petitioners' claim that the state has deprived them of the equal protection of the laws presents a substantial federal question. *Sweatt* v. *Painter*, 339 U. S. 629; *Sipuel* v. *Board of Regents*, 332 U. S. 631.

The court below stated that state legislation requiring segregation was not unconstitutional because of the feature of segregation. In support of this proposition, *Plessy* v. *Ferguson*, 163 U. S. 537; *McCabe* v. *A. T. & S. F. Ry. Co.*, 235 U. S. 151; *Berea College* v. *Kentucky*, 211 U. S. 45; and *Gong Lum* v. *Rice*, 275 U. S. 78 were cited. It is alleged that *Sweatt* v. *Painter*, *supra*, did not change this rule. It sought to redefine the issues raised by describing them as allegation of unjust discrimination under the equal protection

clause rather than of the constitutionality of state segregation statutes (R. 39-40). What we take the court to mean is that in the light of these decisions, petitioners' claim that the denial of their admission to the University of Tennessee, pursuant to the state's policy requiring the segregation of the races in all phases of its educational system including professional and graduate education, is unconstitutional has been foreclosed, and that hence that claim does not present a substantial federal question. Even assuming *arguendo* the correctness of the court's view, we fail to see how it affects petitioners' right to have their applications for injunctive relief heard and determined by a three judge court. At the very least those cases stand for the proposition that enforced racial segregation is permissible under the Constitution as long as the facilities provided Negroes are equal to those available to white persons. This is the condition which must be satisfied if segregation laws are to be held constitutional under the *separate but equal* doctrine. *Ergo,* where that condition has not been met such statutes are necessarily invalid. Certainly where the record shows that: (1) the University of Tennessee is the only state institution offering the courses petitioners desire to pursue; (2) that they have been denied admission thereto solely because of their race, pursuant to state policy; and (3) that petitioners seek to enjoin enforcement of that policy on the grounds that it conflicts with the federal constitution, a substantial claim of unconstitutionality has been made. See *Missouri ex rel. Gaines* v. *Canada, supra.*

We contend that all the ingredients essential to the jurisdiction of a three judge federal court have been met. See *Stratton* v. *St. Louis S. W. Ry. Co.*, 282 U. S. 10; *Smith* v. *Wilson*, 273 U. S. 388; *Moore* v. *Fidelity & Deposit Co.*, 272 U. S. 317; *International Garment Workers Union* v. *Donnelly Garment Co.*, 304 U. S. 243; *Ex parte Hobbs*, 280 U. S. 168; *Phillips* v. *United States*, 312 U. S. 246; *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292

U. S. 386; *Ex parte Poresky*, 290 U. S. 30; *In re Buder*, 271 U. S. 461; *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290. While equity jurisdiction may be withheld in the public interest in exercise of sound discretion, see *Spector Motor Service* v. *McLaughlin*, 323 U. S. 101; *Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U. S. 168; *Burford* v. *Sun Oil Co.*, 319 U. S. 315, the public interest in this case demands that the chancellor exercise his power. See *McLaurin* v. *Board of Regents, supra*. Jurisdiction of a three judge district court was properly invoked, and the court below was in error in refusing to decide this case.

II

If review is not available on direct appeal mandamus will lie to require the court below to assume jurisdiction.

It is clear that where a single judge refuses to convene a three judge court, this Court may issue writ of mandamus directing him to do so. *Stratton* v. *St. Louis S. W. Ry. Co.*, *supra* at page 16; *Ex parte Collins*, 277 U. S. 565, 566; *Ex parte Bransford*, 310 U. S. 354, 355; *Ex parte Metropolitan Water Co.*, 220 U. S. 539; *Ex parte Williams*, 277 U. S. 267; *Ex parte Northern Pacific Ry. Co.*, 280 U. S. 142. Under such circumstance mandamus is the only appropriate procedural remedy, since direct appeal to this Court lies only from a decision by a properly convened three judge court. *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, *supra*; *Jameson & Co.* v. *Morgenthau*, 307 U. S. 171; *Public Service Commission of Missouri* v. *Brashear Freight Lines, Inc.*, 312 U. S. 621; *Gully* v. *Interstate Natural Gas Co.*, 292 U. S. 16. Of course, the proceedings of District Judge TAYLOR subsequent to the order dissolving the three judge court are without effect, and he could be required to again convene a three judge

court. That would be an indirect method of indicating to the court below that it must assume jurisdiction of this cause. The vice, which petitioners seek to correct, however, concerns the refusal of the three judge court which had been properly convened to exercise jurisdiction which, we submit, it clearly possessed. We take the position that the order dissolving the court is appealable in that it was an effective denial of petitioners' application for injunctive relief. A judgment of dismissal or an express denial of injunctive relief, however, may be considered essential for this Court to have jurisdiction on appeal. In that event, we submit, mandamus will lie.

The only decision by this Court, which counsel for petitioners have found, on all fours with this case is *Ex parte Public Nat'l Bank*, 278 U. S. 101. In that case petitioners sought to invoke the jurisdiction of a three-judge court. That court disclaimed jurisdiction, dissolved the court and ordered the cause to proceed before a single district judge on the ground that the requirements essential to a three-judge court had not been met. Motion for leave to file a petition for writ of mandamus to compel the reassembling of the court of three judges was granted by this Court, and a rule to show cause issued. After hearing and argument the rule was discharged, this Court finding that petitioners' cause did not require determination by a three-judge court. Accord, *Osage Tribe of Indians* v. *Ickes*, 45 F. Supp. 179, 186, 187 (D. D. C. 1942). In that case, however, no attempt was made to invoke the jurisdiction of this Court on appeal and that phase of the problem was not considered.[2]

Mandamus will lie where this Court finds that appeal may be unavailable or inadequate. *Virginia* v. *Rives*, 100

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2 For a discussion of the procedural problems incident to this case, See Bowen, *When are Three Federal Judges Required* (1931), 16 Minn. L. Rev. 1, 39-42. The author favors mandamus rather than direct appeal as proper procedural remedy in a situation of this nature.

U. S. 313; *Kentucky* v. *Powers*, 201 U. S. 1; *Virginia* v. *Paul*, 148 U. S. 107; *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86; *Ex parte Simmons*, 247 U. S. 231, 239; *Ex parte Fahey*, 332 U. S. 258, 260. It is used in appropriate cases in aid of this Court's supervisory power over lower federal courts. *McCullough Tool Co.* v. *Cosgrave*, 309 U. S. 634; *Ex parte United States*, 287 U. S. 241. Improper assumption or refusal or jurisdiction on a lower federal court may be reached by this writ. *Ex parte United States*, *supra*, 287 U. S. 241; *Ex parte Skinner & Eddy Corp.*, *supra*; *Ex parte Bradstreet*, 32 U. S. 64, 8 L. ed. 577; *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21, 32; *Ex parte United States*, 319 U. S. 730. Thus, in this case, if this Court finds it does not have jurisdiction on appeal, a writ of mandamus may appropriately be issued to compel the three-judge court below to reassemble and determine whether petitioner is entitled to the injunctive relief prayed for in her complaint.

Conclusion

For these reasons, it is respectfully submitted that a writ of mandamus should issue to compel the court below to reassemble as a specially constituted three-judge federal court and finally decide whether petitioners are entitled to injunctive relief in the event this Court holds that petitioners cannot have the order of the court below reviewed on direct appeal.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 159, Miscellaneous

EX PARTE GENE MITCHELL GRAY, LINCOLN ANDERSON BLAKENEY, JOSEPH HUTCH PATTERSON AND JACK ALEXANDER

REPLY TO THE MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS, PETITION FOR A WRIT OF MANDAMUS, AND BRIEF IN SUPPORT OF MOTION AND PETITION FOR MANDAMUS.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 159, Miscellaneous

EX PARTE GENE MITCHELL GRAY, LINCOLN ANDERSON BLAKENEY, JOSEPH HUTCH PATTERSON AND JACK ALEXANDER

REPLY TO THE MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS, PETITION FOR A WRIT OF MANDAMUS, AND BRIEF IN SUPPORT OF MOTION AND PETITION FOR MANDAMUS.

The respondents, The Board of Trustees of The University of Tennessee, etc., et al., state the following matters and grounds in reply to petitioners' motion herein for leave to file a petition for writ of mandamus:

I

Petitioners seek a writ of mandamus from this Honorable Court directed to the Honorable the United States District Court for the Eastern District of Tennessee, Northern Division, the Honorable Shackelford Miller, Jr., Circuit Judge of the United States Court of Appeals for the Sixth Circuit, the Honorable Leslie R. Darr and the Honorable Robert L. Taylor, Judges of the United States District Court for the Eastern District of Tennessee to show cause

on a day to be fixed by this Court why mandamus should not issue from this Court directing said Honorable Shackelford Miller, Jr., Circuit Judge of the United States Court of Appeals for the Sixth Circuit, and the Honorable Leslie R. Darr and the Honorable Robert L. Taylor, Judges of the United States District Court to vacate and expunge from the record and the order of April 13, 1951 dissolving the three-judge court and the subsequent action of Honorable Robert L. Taylor in which he proceeded to pass upon the issues involved in this case.

As was pointed out in the opinion filed as Appendix A to petitioners' motion, petition and brief and as was held in the cases of *Ex Parte Bransford,* 310 U. S. 354; *Ex Parte Collins,* 277 U. S. 565; *Rescue Army* v. *Municipal Court,* 331 U. S. 549, 568-574, the case of Gene Mitchell Gray, et al. *v.* The Board of Trustees, etc., from which petitioners have sought to appeal directly to this Honorable Court, was not a proper case for the consideration of a three-judge court.

II

The opinion of the District Court of three Judges for the Eastern District of Tennessee, filed on April 13, 1951 (Attached as Appendix A to petitioners' motion, petition and brief), in this cause and the order entered pursuant thereto shows that the question involved in that case was the alleged unjust discrimination against the plaintiffs under the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States, and not the constitutionality of certain statutes of the State of Tennessee, or the order of the Board of Trustees of The University of Tennessee, referred to in the pleadings, and, accordingly, no question was properly presented for determination by a three-judge court.

III

The record in the case of Gene Mitchell Gray, et al., *v.* The Board of Trustees, etc., referred to in petitioners' motion, petition and brief further discloses that the defendants prayed no appeal from the opinion and judgment of the District Court for the Eastern District of Tennessee, Northern Division, filed on April 20, 1951 (97 F. Supp. 463), and, consequently, petitioners' application for a mandamus herein is now moot, the said opinion and judgment of April 20, 1951, having become final.

WHEREFORE, the respondents respectfully submit that petitioners' motion herein should be denied and no writ of mandamus issued.

Dated: October 8, 1951.

Respectfully submitted,

K. HARLAN DODSON, JR.,
JOHN J. HOOKER,
By K. HARLAN DODSON, JR.,
Attorneys for Respondents.

IN THE

Supreme Court of the United States

October Term, 1951.

No. 159 Miscellaneous.

EX PARTE GENE MITCHELL GRAY, LINCOLN ANDERSON BLAKENEY, JOSEPH HUTCH PATTERSON AND JACK ALEXANDER,
Petitioners.

RESPONSE TO RULE TO SHOW CAUSE.

SHACKELFORD MILLER, JR.,
U. S. Circuit Judge,
LESLIE R. DARR,
U. S. District Judge,
ROBERT L. TAYLOR,
U. S. District Judge.
Respondents.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

SUBJECT INDEX.

Cases and Statutes.

IN THE

Supreme Court of the United States

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No. 159 Miscellaneous.

EX PARTE GENE MITCHELL GRAY, LINCOLN ANDERSON BLAKENEY, JOSEPH HUTCH PATTERSON AND JACK ALEXANDER,
Petitioners.

RESPONSE TO RULE TO SHOW CAUSE.

The respondents, Shackelford Miller, Jr., Circuit Judge of the United States Court of Appeals for the Sixth Circuit; Leslie R. Darr and Robert L. Taylor, Judges of the United States District Court for the Eastern District of Tennessee, in compliance with the Rule to Show Cause, issued herein on October 15, 1951, why the petition for Writ of Mandamus should not be granted, make the following response to said Rule.

Following the filing by petitioners of a complaint in the United States District Court for the Eastern District of Tennessee against the Board of Trustees of the University of Tennessee and others, being Civil Action No. 1567 in said court, referred to in paragraph 5 of the petition for Writ of Mandamus herein, the

Honorable Xen Hicks, Chief Judge of the Court of Appeals for the Sixth Circuit, on February 20, 1951, acting under the provisions of Title 28 U. S. Code, Sections 2281 and 2284, designated the respondents as members of a three-judge court to hear and determine the said action or proceeding. Said respondents complied with said designation, convened and sat as said three-judge court in the U. S. District Court for the Eastern District of Tennessee in Knoxville, Tennessee, on March 13, 1951, and at said time held a hearing of approximately two hours in said proceeding.

After giving the matter full and careful consideration, said respondents, acting as said three-judge court, were of the opinion that the statutes of the State of Tennessee, under which the defendants acted, were not unconstitutional; *State ex rel. Michael* v. *Witham*, 179 Tenn. (15 Beeler) 250; *Plessy* v. *Ferguson*, 163 U. S. 537; *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151; *Gong Lum* v. *Rice*, 275 U. S. 78; *Berea College* v. *Kentucky*, 211 U. S. 45; that the issue involved was a question of alleged discrimination on the part of the defendants under the equal protection clause of the 14th Amendment, rather than the unconstitutionality of the statutory law of Tennessee; *Missouri* v. *Canada*, 305 U. S. 337; *Sipuel* v. *Board of Regents*, 332 U. S. 631; *Sweatt* v. *Painter*, 339 U. S. 629; *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637; and that as such it was not one in which the three-judge court had jurisdiction to adjudicate the issue under the provisions of Title 28 U. S. Code, Sec. 2281; *Ex parte Bransford*, 310 U. S. 354; *Ex parte Collins*, 277

U. S. 565; *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568-574; and on or about April 13, 1951, handed down an opinion to that effect which included reasons for such conclusion with citation of authorities relied upon, and entered an order by which the respondents, Shackelford Miller, Jr., and Leslie R. Darr, withdrew from said case and directed that the case proceed before the respondent, Robert L. Taylor, the U. S. District Judge in the District in which the action was filed. Said opinion and order are set out in full in Appendix A at pages 19 through 24 of the printed motion of the petitioners herein for leave to file their petition for Writ of Mandamus, and petition for a Writ of Mandamus and their brief in support of said motion and petition, to which reference is now made for a more complete statement of the case and the reasons for the ruling and the order referred to.

Thereafter, on April 20, 1951, the respondent, Robert L. Taylor, U. S. District Judge for the Eastern District of Tennessee, Northern Division, before whom and in which District and Division the proceeding was originally filed, acting separately and by himself as District Judge in said District and Division, ruled on the case, handing down an opinion in which it was held that petitioners had been denied the equal protection of the laws and that they were entitled to be admitted to the University of Tennessee. Said opinion is reported in 97 Federal Supplement 463, to which reference is now made for a more complete statement of the ruling. Although no injunction was issued by said District Judge at that time, the case was retained

on the docket for such orders as would appear proper thereafter. Petitioners have not requested the entry of any further order to enforce said ruling, although they have obtained by said ruling the right to the entry of such an order granting them the relief prayed for in said proceeding.

Respondents state that the petitioners appealed from the order and judgment of the three-judge court of April 13, 1951, to this Court pursuant to Title 28 United States Code, Sections 1253 and 2101(b). Such appeal is now pending before this Court as case No. 120. The question of the jurisdiction of said three-judge court in said proceeding can be reviewed and decided by this Court in considering and disposing of said appeal. *Wilentz* v. *Sovereign Camp,* 306 U. S. 573. If jurisdiction to hear the cause did not exist in said three-judge court, the ruling of said Court was not erroneous and these respondents should not be required to act further as said court in said matter. If jurisdiction to hear said cause did exist in said three-judge court, the ruling of said Court can be reversed and set aside by this Court in disposing of the appeal and said Court can then proceed to act further in the matter and consider the cause on its merits. Accordingly, petitioners have a complete and adequate remedy at law, making it unnecessary and inappropriate to proceed by application for Writ of Mandamus. *U. S. ex rel. Girard Trust Co.* v. *Helvering,* 301 U. S. 540, 544.

Errors of law in the discharge of a judicial function are not subject to be corrected through the Writ

of Mandamus. See *City of Paducah* v. *Shelbourne, U. S. District Judge*, No. 415 Misc., 341 U. S. 902. Although mandamus is an appropriate remedy to compel a judicial officer to act, *Ex parte Bransford*, 310 U. S. 354, 355, it is not the function of the writ to compel an adjudication in a particular way, and may not be used as a substitute for an appeal, in cases where action has been taken. *I. C. C.* v. *United States*, 289 U. S. 385, 393-394. See *U. S. ex rel. Chicago, etc.*, v. *I. C. C.*, 294 U. S. 50, 61-63.

Wherefore, respondents, having fully responded to the Rule to Show Cause, respectfully pray that the Writ of Mandamus prayed for herein by said petitioners be dismissed, and for all other appropriate relief to which they may be entitled.

SHACKELFORD MILLER, JR.,
U. S. Circuit Judge.

LESLIE R. DARR,
U. S. District Judge.

ROBERT L. TAYLOR,
U. S. District Judge.
Respondents.